Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

IRENE CRUZ- VARGAS, ELI ROGELIO FIGUEROA-CRUZ, LUIS ROGELIO FIGUEROA- CRUZ

Petitioner

v.

R. J. REYNOLDS TOBACCO COMPANY, R. J. R. NABISCO INC., NABISCO GROUP HOLDINGS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS OF THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Does a Congressional enactment which declares as its purpose and policy that the public be adequately informed of smoking and health require that the warnings be in Spanish in Puerto Rico where the predominate language is Spanish and Spanish warnings would not add or change the wording expressly mandated in the enactment.

B. Whether the Court of Appeals committed reversible error by declining to decide whether common knowledge of the hazards and addictiveness of cigarette smoking is an affirmative defense, where the ruling was essential to a Rule 50 (a)(1) determination.

C. Whether the Court of Appeals committed reversible error by affirming lower court decision which took a case from the jury through Rule 50 (a)(1) Fed. R. Civil P., where the jury followed the trial judge's instruction that the jury may disregard uncontroverted, unimpeached expert testimony of an expert witness and thereafter the trial judge on a motion for judgment as a matter of law repudiated his instruction, ruling that uncontroverted, unimpeached expert testimony must be accepted by the jury.

PARTIES TO THE PROCEEDING

Petitioners (hereinafter, plaintiffs) are the widow and two sons of Luis Figueroa Serrano, a long time heavy smoker who choked and died suddenly while smoking Winston cigarettes.

Respondent is R.J. Reynolds Tobacco Company (hereinafter, Reynolds), R.J. Reynolds Tobacco Company is a wholly owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., formerly known as RJR Nabisco, Inc. On December 11, 2000, R.J. Reynolds Tobacco Holdings, Inc. acquired Nabisco Group Holdings Corp, now a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., renamed RJR Acquisition Corp. Since June 15, 1999, R.J. Reynolds Tobacco Holdings, Inc. has been a publicly-owned corporation. Before then, RJR Nabisco, Inc. was a wholly owned subsidiary of RJR Nabisco Holdings Corp., a publicly owned corporation. RJR Nabisco Holdings Corp. is now Nabisco Group Holdings Corp., and since June 14, 1999, has not held a direct or indirect ownership interest in R.J. Reynolds Tobacco Holdings, Inc. or R.J. Reynolds Tobacco Company.

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OPINIONS BELOW

The United States First Circuit Court of Appeals *per curiam* opinion was issued October 28, 2003 and is reported at *Cruz Vargas v. R.J. Reynolds Tobacco Company, 348 F. 3d 271(1st Cir. 2003).* The Court denied petitioner's application for rehearing and rehearing in banc on December 12, 2003. The United States District Court for Puerto issued an opinion granting judgment as a matter of law at *Cruz Vargas v. R.J. Reynolds Tobacco Co., No. 00-2334,*[1] and an opinion for a partial grant of summary judgment at *Cruz Vargas v. R.J. Reynolds Tobacco Company, 218 F. Supp. 2d 109 (D. Puerto Rico 2002).*

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1). This Court granted a motion for extension of time to submit this Petition, to May 10, 2004.

STATEMENT OF THE CASE

Petitioner Irene Cruz is a resident of Puerto Rico and is the widow of Luis Rogelio Figueroa Serrano ("decedent"), who died on October 18, 1999. Plaintiffs Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz are the sons of the decedent, and are also residents of Puerto Rico.

R.J. Reynolds Tobacco Company (hereinafter, Reynolds) is a New Jersey corporation with its principal place of business in North Carolina. Reynolds at all times pertinent hereto designed, manufactured cigarettes and marketed its Winston brand cigarettes in Puerto Rico, since 1954.

The decedent, Luis Rogelio Figueroa Serrano was born on August 28, 1951, and lived in Utuado, Puerto Rico.[2] He worked as a mechanic, tow truck driver, and a public bus driver. His family perceived him to be a strong, healthy person during most of his life. The decedent's primary language was Spanish. He could not read, write, or speak English. The decedent did not typically read

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[1] After exhaustive search, counsel was unable to locate the reported opinion for the final judgment in this case. Please see Appendix, p. 45 for copy of opinion.

[2] Utuado is located in the central rural area of Puerto Rico, far from urbanization.

newspapers, magazines nor did he watch much television.

The decedent began smoking Winston cigarettes as early as 1961. He passed away suddenly on October 18, 1999. On the date of his death, the decedent was forty-eight years old. The official cause of death was listed as essential primary hypertension.

Plaintiffs Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz proceeded to trial, asserting state law tort claims of negligence and strict liability against Reynolds for its alleged failure to adequately warn their deceased father of the health risks and addictive nature of smoking prior to July 1, 1969.

Plaintiffs expert witness, Dr. James Nelson, testified the amount the decedent smoked was a factor in making his blood pressure high and difficult to control. Dr. Nelson concluded that smoking was a substantial factor in the decedent's blood pressure and in the cause of his death.

At the close of the presentation of plaintiffs' evidence, Reynolds moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50. The lower court deferred ruling on the motion until the jury reached its verdict. The jury's verdict was in favor of Luis and Eli Figueroa. It awarded damages in the amount of Five Hundred Thousand dollars ($500,000.00) to each. On October 21, 2002 the district court entered judgment as a matter of law dismissing Luis and Eli Figueroa's claims.

The lower court's Rule 50(a) determination constituted error which requires reversal and the following issues were raised on appeal:

a) The Federal Cigarette Labeling and Advertising Act (the Labeling Act), codified at 15 U.S.C. Sec. 1331 et. seq. was enacted to expressly assure that the public be adequately informed of the hazards of cigarette smoking. Plaintiffs contend that Reynolds failed to implement Congress' expressed purpose and policy in regard to warnings in Puerto Rico, a territory where the predominant language is Spanish. Reynolds' cigarette products sold in Puerto Rico have always contained English warnings.

b) The lower court erroneously concluded that plaintiffs were required to prove that smoking hazards and addiction were not common knowledge in the 1960's. This would have required plaintiffs to prove the case beyond the burden of proof required

by law. Common knowledge is an affirmative defense. *American Tobacco Co. v. Grinnell, 951 S.W. 2d 420, 427 (1997); Brunswick Leasing Corp. v. Wisconsin Cert., Ltd. 136 F. 3d 521, 530 (7th Cir. 1998).*

c) Reynolds' evidence on the issue of common knowledge was contrary to the experience of the jurors; it was inconsistent and contradictory and irrelevant, i.e., Reynolds' expert psychiatrist testified that nicotine intake from cigarettes was not addictive, while introducing evidence through its expert historian that nicotine was addictive. Also, Reynolds' expert's testimony regarding common knowledge of the harm of smoking in 1650s rendered his testimony unreliable in regard to cigarette smoking in the 1960s. Contrary to the lower courts' findings, Reynolds adduced no expert testimony on the addictiveness of cigarette smoking and nicotine being commonly known.

d) There was ample evidence supplied by plaintiffs, which provided reasonable foundation for the jury's verdict. A plethora of courts recognize the Labeling Act and its successive amendments in 1969 and 1984 as support for an inference that the public was inadequately informed of the health consequences of smoking. The lower court did not consider enactment of the Labeling Act as evidence that the public is under-informed of the health consequences of smoking. The lower court was unaware that federal warnings were in evidence, even though it was the lower court that read the warnings to the jury at the requests of plaintiffs and Reynolds, and through its instructions to the jury.

e) The lower court failed to conclude that the jury might have inferred that the addictiveness of cigarettes was not commonly known in Puerto Rico in the 1960s because warning labels were printed in English. Today they are still printed in English.

f) The jury could have inferred in accordance with the lower court's instruction that the "common knowledge" defense did not apply to adolescents but only to the ordinary consumer.

g) The jury was instructed, without objection, that they "should consider each expert opinion received in evidence and give it such weight as you think it deserves. You should bear in mind that the opinions of experts do not bind the Court and they do

not bind you." In ruling on the Rule 50(a) motion, the trial judge overruled the jury verdict and found that the uncorroborated, improbable testimony of Reynolds expert historian could not be rejected. Moreover, Reynolds elicited evidence from its other expert witness that contradicted the historian's expert testimony.

h) Petitioner's expert neurologist dispelled any notion of addiction being commonly known by explicating the dynamics of nicotine addiction. Dr. James Nelson's testimony raised inferences that the hazardous and physiologically addictive nature of smoking was not common knowledge. Reynolds did not adduce any expert neurological testimony.

REASONS FOR GRANTING WRIT

I. DUTY TO PROVIDE SPANISH WARNINGS

Whether or not warnings on Reynolds' cigarette packages should bear Spanish warnings in Puerto Rico was a dispositive issue raised on appeal which the Appellate Court declined to consider. The Federal Cigarette Labeling and Advertising Act (hereinafter, the Labeling Act) creates a federal duty to warn, notwithstanding, both the Trial and Appellate Courts held, in the face of the Labeling Act, Reynolds had no duty to warn. This decision was erroneous in light of local, federal and constitutional principles of equal protection.

In order for Defendant to fulfill its legal duty to adequately inform the Puerto Rican public that cigarette smoking may be hazardous to health, the warnings on the cigarette packages must transcend the language barrier in Puerto Rico, a predominantly Spanish speaking territory.[3] *Aponte v. Sears Roebuck, 144 D.P.R. 830, 842 (1998).* The Labeling Act does not provide the mandatory language for cigarette package warnings, only the mandatory wording. *Palmer v. Liggett Group, 825 F. 2d 620, 623 n.5 (1st Cir. 1987).* Therefore, a standard requiring that the warnings should be in Spanish is not preempted by the Labeling Act because it does not

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[3] Rather than applying local law, the Court of Appeals adopted the dissenting opinion in *Aponte*, which is contrary to local law. *See Cruz Vargas, 348 F. 3d 271, FN11 (1st Cir. PR 2001).*

contradict or require anything additional to the wording established by Congress in the Act.[4] Relevant jurisprudence supports the proposition that to adequately inform of a risk inherent to the product, the warning has to be understandable to the population that comprises the area where product is marketed and advertised. The failure to do so lays the foundation for a strict liability claim. To interpret the Labeling Act as requiring only warnings in English in Puerto Rico violates the constitutional right of Puerto Ricans to Equal Protection of the Law. Implementation of the purpose of the Labeling Act and to sustain its constitutional validity, presupposes that the wording on labels in Puerto Rico be in Spanish. This requirement would not affect or impede commerce through the imposition of nonuniform labeling regulations because Puerto Rico is the only jurisdiction in the United States where the predominant language is foreign. Furthermore, the language and impact of the preemption scheme established by Congress through the Labeling Act is designed to protect consumers and manufacturers alike. Recent circuit court holdings permitting manufacturers to obtain exoneration from consumer claims through the defense of "common knowledge" is fundamentally subversive of Congress' enactment that the public is inadequately informed of the health hazards of smoking. Permitting the "common knowledge" defense for manufacturers, while applying preemption to failure to warn claims, imposes discrimination against consumers, affects their fundamental right to life [5], and constitutes a violation of the Equal Protection of the Law guaranteed by the Fifth Amendment of the Constitution. *See Mathews v. De Castro, 429 U.S. 960 (1976); Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976).*

A. Translating the mandatory wording of the warnings required by the Labeling Act to Spanish achieves the Congressional purpose of informing the public of Puerto Rico, and does not imply an interference with the scheme set forth by Congress in the Labeling Act.

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[4] The decedent began smoking four years before the Labeling Act was enacted, thus preemption could have no application in the instant case.

[5] Cigarettes cause more than 400,000 deaths per year in the United States alone. *Food and Drug Administration v. Brown & Williamson Tobacco Corporation, 529 U.S. 120, 127-129 (2000).*

The Labeling Act, at Section 2, states the policy of Congress and its purpose in enacting the provisions of the act as follows:

> ***"It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—***
>
> 1) ***the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and***
>
> 2) ***commerce and the national economy may be (a) protected to the maximum extent consistent with this declared policy and (b) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."***
>
> ***15 U.S.C.A. §1331 (emphasis added)***

The main purpose is thus to **adequately inform the public** and to protect commerce and the national economy **to the maximum extent consistent with this declared policy** by avoiding non-uniform regulations **with respect to any relationship between smoking and health**. *See Cipollone v. Liggett Group, 112 S.Ct. 2608, 2616 (1992).*

To achieve the purpose declared in Section 2, the Labeling Act sets forth in Section 4 the different warnings that might be used by the manufacturer on cigarette packages. *15 U.S.C.A. §1333.* In Section 5, the Labeling Act includes a preemption clause which establishes that **no additional statements** should be required on any cigarette package. *15 U.S.C.A. §1334.* The Senate Report accompanying the Labeling Act of 1969 explained that the revised preemption provision was "narrowly tailored" and necessary "to avoid the chaos created by a multiplicity of conflicting [cigarette advertising] regulations." *S.Rep. No. 91-566 (1970), reprinted in 1970 U.S.C.C.A.N. 2652, 2663.* Relevant First Circuit jurisprudence, following *Cipollone*, recognizes that the preemption

set forth in Section 5 was not designed to protect the tobacco industry from all state-imposed commercial burdens but was directed only at regulations regarding promotion and advertising that concern the relationship between smoking and health. *See Phillip Morris v. Harshbarger, 122 F. 3d 58, 81 (1st Cir., Mass, 1997)(holding that the majority in Cipollone recognized neither a statutory purpose to protect the tobacco industry from all state-imposed commercial burdens, nor some overarching "balance" from which an expansive domain of preemption might flow).*

The Labeling Act, at Section 5, only prohibits requirements of **additional statements,** referring to the specific **wording,** not language, mandated by Congress. *Palmer, supra at 623 n.5.* In contrast with other Federal legislation, the Labeling Act does not indicate that the wording required by Section 4 has to be in English.[6] As recognized by the Food and Drug Administration (FDA) regulation, Puerto Rico's language peculiarity is an isolated situation taken into account by the FDA due to its singularity. The scheme set by Congress in the Labeling Act does not specify the language required, and a translation to Spanish requires no change in the wording mandate, no impact on commerce, national economy, nor an impediment by diverse, nonuniform and confusing cigarette labeling. *See Phillip Morris Inc. v. Harshbarger, 122 F. 3d 58, 80 (1st Cir. 1997) (holding that the mere fact that a subject of federal legislation requires an "intricate and complex response from the Congress" does not necessarily indicate that Congress intended its response to be the exclusive means of addressing the issue).* Rather, the scheme set forth by Congress is reinforced by a translation of the wording in Section 4 to Spanish because implementation presuposes translation in order to fulfill Congress' express purpose of adequately informing the Puerto Rican public. *Id at 75 (stating, based on Cipollone holding, that the Labeling Act*

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[6] Labeling regulation of the Food and Drug Administration provides the following:

"(c)(1) All words, statements, and other information required by or under authority of the act to appear on the label or labeling shall appear thereon in the English language: Provided, however, that in the case of articles distributed solely in the Commonwealth of Puerto Rico or in a Territory where the predominant language is one other than English, the predominant language may be substituted for English." 21 C.F.R. §201.15.

does not delineate the exclusive scope of consumer-communication duties). Having elected to render English warnings in the only jurisdiction where the predominant language is not English, defendant has undermined and punctured congressional intention and policy. *Id at 87 (holding that the federal scheme is not so pervasive as to make reasonable the inference that Congress left no room for it to be supplemented).*

That the purpose of the Labeling Act is enforced through the translation of the mandated wording of the warnings to Spanish in cigarette packages sold in Puerto Rico is reflected in the debate that took place during the congressional hearings for the 1984 Amendments of the Act. *Public Law 98-874, 98 Stat 2200 (1984).* During the congressional hearings, the issue of adequate warnings in advertisements in publications was addressed as follows:

> *"The committee recognizes that cigarette manufacturers or importers, may elect to advertise in publications, intended for distribution in the United States, which are not published in English. In such circumstances, and as is currently required, the language of the warning statements should be printed in the predominant language of the publication in which the advertisement appears. For example, if a cigarette ad appears in a publication distributed in the United States and which is printed in Spanish, the language of the warning statement should be printed in Spanish."* *H.R. Rep. 98-805, 1984 U.S.C.C.A.N. 3718.*

This interpretation is in conformity with the purpose of the Act, that is to effectively disseminate the health consequences of smoking.

In a frequently cited case, *Ramírez v. Plough, 6 Cal.4th 539 (1994)*, the Court ruled that the Defendant did not have any legal duty to provide warnings in Spanish because the FDA regulation in question *(see Footnote 1)* **expressly** required the warnings to be in English. *Id at 552 (holding that "[g]iven the existence of a statute expressly requiring that package warnings on nonprescription drugs be in English, we think it reasonable to infer that the Legislature has deliberately chosen not to require that manufacturers also include warnings in foreign languages") (emphasis added).* Without an express language requirement, a

reasonable person would conclude that the standard of due care requires, in the jurisdiction of Puerto Rico, that warning labels be in Spanish. This proposition was sustained by the First Circuit Court of Appeals in *Torres-Rios v. LPE Laboratories, Inc. 152 F 3d 11, 13-14 (1st Cir. 1998)*, where the Court determined that Defendant's warnings were adequate because they included a pictorial that bridged the language gap. Thus, even where the Code of Federal Regulations mandate English warnings, absent a pictorial, the warning is inadequate in Puerto Rico. *See Milanese v. Rust-Oleum Corp., 244 F. 3d 104, 109 (2nd Cir. 2003) (holding that the court in Torres-Rios found that the label adequately warned of the hazard only because it contained a pictorial which bridged the language gap); also Hubbard Hall Chemical Co. v. Silverman, 340 F. 2d 402, 405 (1st Cir. 1965), (sustaining a jury finding that Defendant did not meet standards of due care with their English warning labels that lacked a pictorial, and which were inadequate for Puerto Rican users of the product even though they complied with federal requirements).*

Furthermore, relevant caselaw establishes that manufacturer's duty to provide understandable warnings increases when their products are targeted to Spanish speaking population through marketing and advertisement in their native language. In *Ramírez, supra at 555, and the concurring opinion,* the court inferred that a manufacturer's liability may be predicated upon targeting Hispanics through advertisement in Spanish while warning a product's risks in English, where the consumer is unable to read the product's warnings. *See also Stanley Industries Inc. v. W.M. Barr & Co., 784 F. Supp. 1570, 1575-1576 (SD. Fla. 1992).*

Reynolds would have the Court interpret Congress' silence about the language of the required warnings as a mandatory requirement that cigarette-warning labels be in English only. The Labeling Act, however, does not allow such an inference or interpretation. In the absence of a clear Congressional statement regarding a language requirement, in contrasts with other Congressional regulations that expressly mandate English language warnings, the Court is required to interpret the ambiguity of the statute in a manner best calculated to achieve its purpose. *See Jones v. Rath Packing, 430 U.S. 519, 525 (1977); and Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529*

U.S. 120, 132 (2000) (holding that the meaning or ambiguity of certain words and phrases may only become evident when placed in context and that need for guidance can be overcome through the application of common sense). Common sense in the context of the instant case dictates that when there is no language requirement in the Labeling Act, and when cigarette products in Puerto Rico are marketed and advertised in Spanish, the act imposes on manufacturers the legal duty to translate warnings to Spanish.

C. To interpret the Labeling Act as requiring only warnings in English violates Puerto Ricans' constitutional right to Equal Protection of the Law.

Reynolds cites a ruling of the District Court of Puerto Rico in the case Cruz Vargas v. R.J. Reynolds Tobacco Co., *218 F. Supp. 2d 109, 117 (D. Puerto Rico 2002)*, which states as follows:

> *"The requirements of the Labeling Act are unambiguous. The statute provides the precise and mandatory language for cigarette package warnings. The statute does not require the warnings to be in any other languages besides English, and Plaintiffs have not cited any relevant authority to support their contention. Furthermore, the Labeling Act provides that no additional warnings are required on cigarette packages, and we find that this includes warnings in Spanish."*

The Court cited no authority in support of its ruling. Furthermore, it is erroneous to say that the statute provides the precise and mandatory language for cigarette package warnings because, as presented above, it does not. The statute does not require the warnings to be in any specific language. That the Labeling Act provides that no additional warnings are required does not present a barrier to a translation of the warnings to Spanish for the specific jurisdiction of Puerto Rico. To make the erroneous inference made in the Cruz Vargas case goes against congressional purpose established by the Labeling Act and the caselaw discussed above.

To interpret the Labeling Act as a Congressional mandate for English-only warnings, renders the Labeling Act ineffective and unconstitutional because it denies the citizens of Puerto Rico, who

speak Spanish due to their national origin and ancestry, equal protection, and impedes Puerto Ricans from demanding a standard of due care appropriate for the people's health and welfare. It is clearly established that the equal protection guarantee of either Fifth or Fourteenth Amendment of the United States Constitution applies to Puerto Rico. *Di Marco-Zappa v. Cabanillas, 238 F. 3d 25, 36 (1st Cir, P.R. 2001); Posadas de Puerto Rico v. Tourism Company of Puerto Rico, 478 U.S. 328, 331 (1986); Examining Board v. Flores Otero, 426 U.S. 572, 600 (1976).* Puerto Ricans may not be discriminated against based on either their national origin or ancestry, and where such a classification exists it must withstand the strictest constitutional scrutiny. *See Di Marco, supra, citing Lopez v. S.B. Thomas Inc., 831 F. 2d 1184, 1188 (2nd Cir, 1987) and Adarand Constructors v. Pena, 515 U.S. 200, 213-219 (1995).* Since Puerto Rico's predominant language is Spanish, due to national origin and ancestry, to interpret the Labeling Act as in *Cruz Vargas* implies a disparate treatment under the law not based on a reasonable classification. *See Toll v. Moreno, 458 U.S. 1, 40 (1982); also Hernández v. Texas, 347 U.S. 475, 478 (1954); and Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886) (holding that "[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution").*

Therefore, in order to sustain such disparate treatment of the Puerto Rican population residing in Puerto Rico, Reynolds would have to demonstrate that a compelling state interest is being served by the suspect classification. *See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)(holding that "[b]ecause statutory classifications by race, alienage or national origin is so seldom relevant to achievement of any legitimate state interest and because such discrimination is unlikely to be soon rectified by legislative means, laws that so classify ae subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest").* The state interest in this case is found in the purposes of the Labeling Act, as stated in *Cipollone, supra at 2616.* Since translating the Labeling Act's mandated

warnings on cigarettes packages sold in Puerto Rico **would not** affect national economy or imply diverse, nonuniform and confusing cigarette package labeling, but rather serve to adequately inform the public in Puerto Rico, the classification created by the *Cruz Vargas* interpretation of the act would not serve a compelling state interest. In fact, such disparate treatment has no relation to the objectives of the legislation. *See Johnson v. Robinson, 415 U.S. 361, 374-375 (1974) (holding that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike" and that the individual's right to equal protection of the laws "denies the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute").* The people of Puerto Rico are entitled to the protection afforded to consumers of cigarette products by the Labeling Act, and manufacturers must comply with a warning standard that fulfills the purpose of the Act and that sustains the Acts' constitutionality by respecting Puerto Ricans' right to equal protection of the law.

II. COURT ERRONEOUSLY GRANTED JUDGMENT AS A MATTER OF LAW

A. Factfinder Not Compelled To Believe Uncontradicted And/Or Unimpeached Testimony That Is Open To Doubt

The fact finder is not compelled to believe uncontradicted and unimpeached testimony. *Quokting v. U.S., 140 U.S. 417, 420 (1891); Masciale v. United States, 356 U.S. 386, 388 (1958).* This rule is not followed in those situations where there is no conflict in the evidence, or any circumstance from which an inference against the fact testified could be drawn. *Cheseapeake & O.Ry. Co. v. Martin, 283 U.S. 209, 218 (1931), citing Kelly v. Burrougs, 102 N.Y. 93.* Under its particular set of facts, *Cheseapeake* holds that a jury is not at liberty, under the guise of passing upon the credibility of a witness, to disregard testimony when from no reasonable point of view it is open to doubt. *Id at 214.* This has been interpreted by the Appellate Court of the First Circuit as meaning that the only instance that a jury may reject uncontradicted

and unimpeached testimony is when credibility is at issue. *See* *Quintana-Ruiz v. Hyundai Motor Corp., 303 F. 3d 62, 75-76 (1ST Cir. 2002) (Holding that "a jury may not reject testimony that is uncontradicted and unimpeached unless credibility is at issue.").* There is an imperative need for clarification relative to when a jury might reject uncontradicted testimony. The *Quintana* ruling, which was applied by the Appellate Court to affirm the lower court in the instant case, distorts the doctrine established by the Supreme Court in *Cheseapeake* and its progeny.

In *Cheseapeake* the Supreme Court, while considering the standard that applies to a demurrer to the evidence or a motion to direct the verdict, held that the Court could not **disbelieve the testimony of a witness establishing a fact which is completely corroborated and beyond all fair doubt**. *Id. at 214.* The testimony at issue in *Cheseapeake* pertained to the time necessary for the completion of a delivery between two points, about which the court concluded the following: "Not only is the estimate of the agent reasonable upon its face and in accordance with probability; and not only is it wholly unchallenged by other evidence or circumstances; but it is so completely corroborated by the undisputed facts in respect of this very shipment as to put it beyond the reach of a fair doubt." *Id at 215.* The testimony was so corroborated that it was not correct to doubt it just because the witness was an employee of the defendant, a presumably interested party. *Id at 214.* The testimony was very simple, establishing a fact easily corroborated. In contrast, the testimony at issue in the instant case is an opinion about the state of collective consciousness in Puerto Rico more than 35 years ago, involving conflicting proof, circumstances justifying countervailing inferences and suggesting doubt as to the reasonableness of Dr. Martinez' statement, who's testimony was of a such nature as to be open to challenge as being suspicious and inherently unpersuasive.

The distortion of *Cheseapeake* doctrine, as reflected in the instant case, points to the necessity of clarification by the Supreme Court on the limits of the rule. *Cheseapeake* has only been cited in Supreme Courts' majority opinions twice, in *Pennsylvania R. Co. v. Chamberlain, 288 US 333, 343 (1933)* and *Pence v. United States, 316 US 332, 340 (1942)*, and in both cases the testimony at issue pertained to contemporaneous facts, not an opinion. In

Pennsylvania the court considered the testimony of plaintiff's sole witness, which was elicited in order to prove causality between the collision of two trains and the death of plaintiff's relative in a claim for damages. The witness had not seen the collision, but had heard a noise from which the witness inferred that the collision occurred. This inference, in contrast with the testimony of three eyewitness employees who testified that they did not see a collision, moved the court to conclude: "We therefore, have a case belonging to that class of cases where proven facts give equal support to each two inconsistent inferences; in which event, neither of them being established judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Pennsylvania at 339.* The Court cited *Cheseapeake* merely to sustain the proposition that the fact that these witnesses were employees of the defendant did not impair the conclusion that there was literally no evidence from plaintiffs to prove causality between the collision and the death of plaintiff's relative.[7] *Pennsylvania at 343.* Plaintiffs had the burden of proving causality, an element necessary to establish a prima facie case. The case therefore was taken away from the jury. *Pennsylvania at 343.*

Pence was also a case in which the evidence was factually undisputed. *Pence at 340, citing Cheseapeake.* The case involved a claim for plaintiff's husband's insurance, and his admissions against interest, which left no room for conjecture as to the falsity of his statements and his intent to defraud the insurer. *Id at 339.* It was therefore proper to enter a directed verdict in favor of defendants and deny plaintiff the policy benefits claimed because she failed to contradict the presumption that her husband's contrary statements proved his fraudulent intent. *Id 339-340.* Even with such clear and simple facts, there were dissents from three judges who were concerned with how the decision affects the role of the jury. The writer of the dissent, Justice Murphy, stated:

"In view of the high value and importance

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[7] The Appellate Court relied on the principle that payment for experts testimony does not affect the expert's credibility. Plaintiffs contend that the amount of compensation should be a factor relevant to credibility. Dr. Martinez received more than $40,000 from Reynolds for his expert testimony.

attached by custom and tradition to the right of jury trial as a feature of our federal jurisprudence, and the significant emphasis provided by the Federal and state constitutions, scrupulous care should be exercised by courts and judges to avoid rulings, on motions for the direction of a verdict which in effect wrongfully deprive a litigant of the cherished right. On such a motion our function is not to evaluate the evidence for the purpose of determining whether fraud had been committed. I am unable to agree with the opinion of the Court because I think there was sufficient evidence to justify submitting the issue of fraud to the jury."

B. Usurpation Of Jury's Role Through Improper Framing Of The Standard Under Rule 50(A)

The gist of the dissenting opinion in *Pence*, that the Court should not evaluate or weigh the evidence while considering a motion for a directed verdict, has been sustained numerous times by the Supreme Court in leading opinions such as *Anderson v. Liberty Lobby, 447 U.S. 242, 254 (1986) and Reeves v. Sanderson Plumbing 530 U.S. 133, 150 (2000).* Yet, the problem seems to stem from the framing of the standard. In both cases the Supreme Court reiterates that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson at 255 and Reeves at 150.* But in *Reeves*, when presented with the question of what evidence should be given credence by the courts while passing on a Rule 50 motion, the Supreme Court stated:

> *"Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. See Wright & Miller 299. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Id, at 300.*

This statement has been taken by many courts as carte blanche authority to proceed to overrule jury decisions if they consider the evidence "as a whole" presented a case favorable to the moving party. Taken out of context, the above cite of ***Reeves*** has been interpreted as an expansion of the rule set by ***Cheseapeake***, augmenting the category of "evidence that the jury HAS to believe" and disregarding the context in which ***Reeves*** was resolved. Thus application and implementation defeat the rule.

The possibility that expansion may affect the rule set by ***Reeves*** was identified by Justice Ginsburg in her concurring opinion. She explained that the Court in ***Reeves*** held that plaintiffs in a case of employment discrimination may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case,"...and second, evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false. ***Reeves*** *at 154.* Both are evidence upon which the burden of proof rests with the plaintiff, as established for age discrimination and its framework of burden shifting. *Id at 143.* The court in ***Reeves*** emphasizes that the record should be analyzed as whole, not because of a credibility issue, but due to the error of the Appellate Court in ignoring the evidence supporting petitioner's prima facie case: "That is, the Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination." *Id at 146.* As explained by the court before reaching this conclusion, "although the presumption of discrimination drops out of the picture once the defendant meets its burden of production, the trier of fact may still consider the evidence establishing the plaintiff's prima facie case and inferences properly drawn therefrom... on the issue of whether the defendant's explanation is pretextual." *Id at 143 (citations omitted).* Justice Ginsburg writes in her concurring opinion:

> *"I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for*

judgment as a matter of law. I anticipate that such circumstances will be uncommon. As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives rise to a rational inference that the defendant could be masking its actual, illegal motivation. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). But the inference remains – unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgement as a matter of law, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above." (citations omitted) Id at 154-155.

As pointed out by Justice Ginsburg, once the plaintiff carries its burden of proof as required under the case law, the court should decide, by making all reasonable inferences, that plaintiff's case should go to the jury. Inferences made by the jury are only defeated by a conclusive demonstration that the inferences are wrong, and such conclusiveness is, as Justice Ginsburg contends, atypical.

The standard for ruling on a Rule 50 motion, as established in Reeves, does not change the doctrine that even uncontradicted opinion is not conclusive if it is intrinsically unpersuasive, Dayton P. & L. Co. v. Public Utilities Commission, 292 U.S. 290, 299 (1934) (citing Head v. Hargrave, 105 U.S. 45 (1881), which holds that although great weight should be given to expert opinions, they are not to be blindly received and are to be intelligently examined by the jury in the light of their own general knowledge.), and an

analysis of substantiality of the evidence must fairly take into account whatever in the records detracts from its weight. *Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 488 (1951).* It is the prerogative of a jury or other trier of fact to disbelieve uncontradicted testimony unless other evidence conclusively shows that the testimony must be true *Cheseapeake*, supra. What *Reeves* establishes is that the whole record must be considered to determine whether plaintiffs passed muster, fulfilling their burden as set by law, and requiring the case to be submitted to the jury. In cases such as *Cheseapeake*, *Pennsylvania*, *Anderson* and *Reeves*, plaintiffs were successful (or failed) to configure a plausible cause of action against defendants by fulfilling (or failing to carry) their burden of proof. Nevertheless, this is not the framing of the standard in many other Circuit cases, such as *Quintana* and *Cruz Vargas*, where the Courts have gone further by evaluating the evidence of all the parties, analyzing its weight, even after it is clear that plaintiffs had established a prima facie case against defendants.

In *Quintana* the Court recognized that in the First Circuit courts weigh evidence when ruling on motions for a directed verdict. Citing another First Circuit Court case, the *Quintana* court explained: "The *Collazo Santiago* court found that the plaintiff adduced sufficient evidence for the jury to find that the defendant's expert was an interested witness. *149 F. 3d at 28.* Thus, the decision rested not on an absolute rule but, rather, on a assessment of the weight of the relevant evidence." *Quintana, supra at 77.* The Court proceeded to conclude that, since the plaintiffs did not proffer any proof that defendant's expert was biased or his testimony was doubtful, the jury was compelled to believe his testimony which established defendant's defense against plaintiffs' *prima facie* case. *Id at 78.* Instead of deciding whether plaintiffs carried their burden, the Court in *Quintana*, after submitting the case to the jury, overruled the jury's determination by weighing the evidence related to defendant's affirmative defense.

This erroneous framing of the standard occurred in the instant case. The *Cruz Vargas* Courts overruled the jury's verdict and substituted the jury's evaluation of defendant's evidence on the issue of common knowledge with its own judgment. By doing this, the Court disregarded the doctrine established in *Cheseapeake* and its progeny: (1) That the court can only grant a motion for directed

verdict when there is no evidence at all that supports plaintiff's cause of action; and (2) that when considering the record, the court should not weigh the evidence. In answering plaintiffs' contention that they had carried their burden in establishing their *prima facie* case and that it was the jury's role to determine the sufficiency of defendant's evidence, the Appellate Court ruled:

> *"Appellants here take a different approach contending that they did not have a burden to produce any evidence at all [about common knowledge]. The crux of appellants' entreaty on appeal is that neither the strict liability nor the negligence claim requires any affirmative showing, and thus the burden rested entirely on Reynolds. Whether or not this is the correct view of the law, after searching the record we have found no evidence which supports appellants allegations that there was lack of common knowledge and thus we are compelled to find that Reynolds met its burden in any event."* Cruz Vargas, *supra at 10 (emphasis added).*

A careful reading of the foregoing reveals that the Appellate Court erroneously states that the plaintiff and defendant, both, have the burden of proof on the issue of common knowledge. It should be noted that common knowledge is an affirmative defense, and Reynolds pleaded it as such. *See American Tobacco Co. v. Grinnell, 951 S.W. 2d 420, 427 (1997) (holding that "common knowledge is an extraordinary defense that applies only in limited circumstances" and that "common knowledge is referred to as a defense because the product user has the burden to prove that the seller had a duty to warn of a product's danger, while the product seller may assert that no such duty existed because of the common knowledge regarding such danger."); also Brunswick Leasing Corp. v. Wisconsin Cert., Ltd. 136 F. 3d 521, 530 (7th Cir. 1998)(holding that "where Rule 8(c) does not specifically list an issue as an affirmative defense, resort to state law dealing with burdens of proof is the only logical method to ascertain the pleading character of a defense.")* The correct view of the law, i.e. that plaintiffs did not have to affirmatively prove lack of common knowledge, is clearly established by local law. *See Aponte Rivera v. Sears Roebuck, 44 Official Translations __, 144 D.P.R. 830 (1998). Aponte* holds that under the doctrine of strict liability of the

manufacturer or seller for damages caused by defective or dangerous products, plaintiff has the burden of proving that the product was defective and that said defect was the cause of the injury sustained through a reasonably foreseeable use of the product. *Aponte, Official Translation p. 4-5; also see Santana v. Superior Packaging, Inc. 132 D.P.R. 115 (1992).* The defects in the product include manufacturing defects, design defects and defects for insufficiency of warnings or instructions. *Id at 5.* Thus, the lower and appellate court in the instant case erroneously concluded: "Therefore, as part of his burden...Plaintiff had to show that the ordinary consumer did not have knowledge of the risks of smoking before July 1, 1969." *See Appendix, p.53.* Further, the court ruling in *Aponte* indicates that in Puerto Rico, common knowledge is not a dispositive defense, especially if that knowledge only consists of a general idea of the danger involved. *See Aponte supra at 9-10 (Holding that although plaintiff knew that the battery was a dangerous and explosive product, he did not know the specific dangers of handling terminal connector, and therefore the lack of warning became the proximate cause of the accident.)* The Appellate Court decision as stated above clearly violated the doctrine established under Erie v. Tompkins, 304 U.S. 64 (1938).

Plaintiffs in the instant case affirmatively established their case of strict liability and it was the role of the jury to evaluate the sufficiency of the evidence presented by defendants on the issue of common knowledge. *See Boyle v. United Technologies Corp., 487 U.S. 500, 514 (1988) (Holding that whether the facts establish the conditions for the defense is a question for the jury, and that it would be incorrect for the court to assess on its own, in a judgment as a matter of law, whether the defense had been established.)* Unlike the situation presented in *Cheseapeake*, *Pennsylvania*, *Pence*, and *Anderson*, plaintiffs did indeed fulfill their burden by establishing facts from which reasonable conclusions could be reached by the jury for a verdict in plaintiff's favor. Such a case, as discussed by Justice Ginsburg in her concurring opinion in *Reeves*, should be submitted to the jury for evaluation of the evidence as a whole to make the necessary inferences.

One of the leading cases that establishes these standards is *Anderson*, where the Supreme Court reviewed a summary judgment ruling on a case of libel to determine whether the heightened

evidentiary requirements that apply to proof of actual malice could be considered at that stage. *Anderson at 247*. Malice is an element required to establish a *prima facie* case of libel, and it has to be shown with "convincing clarity". *Id at 244*. The Court in *Anderson* ruled that the convincing clarity had to be considered by the judge when deciding whether to send the case to the jury. *Id at 254*. The standard is therefore whether plaintiffs established their case to the degree required by the burden of proof that applies to their cause of action. The Court concluded: "Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding, either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id at 255-256*. By effectively proving a case in accordance with the burden of proof, the proponent establishes a prima facie case that should be decided by a jury. The *Anderson* court is emphatic in that "credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor" *Id at 256, citing Adickes v. S.H. Kress & Co., 398 U.S.144, 158-159 (1970)*. The court in *Reeves* also sustains this proposition. *Reeves, supra at 150*. This must me so in order not to denigrate the role of the jury. In the instant case, by disregarding the fact that plaintiffs effectively proved a *prima facie* case of strict liability under Puerto Rico law, from which a jury could have reasonably found in favor of plaintiffs, and by weighing conclusively the evidence of defendants on their affirmative defense of common knowledge, the Court invaded the role of the jury and misconstrued Supreme Courts' doctrine as established in *Cheseapeake*, *Pennsylvania*, *Pence*, *Anderson*, *Adickes*, and *Reeves* impermissibly.

C. Common Knowledge Was Not Proven Beyond All Fair Doubt

As discussed above, under *Cheseapeake* the jury is not at liberty to disregard testimony about a corroborated fact when it has

been established beyond all fair doubt. That standard was not met by the testimony of defendant's sole witness on common knowledge in this case. Defendant's expert historian, Dr. Martínez, did not testify that the addictive nature of nicotine was common knowledge in the 1960's. *See Trial Trans. pp. 318, 360-361 (where Martinez testifies that his opinion was that the average consumer on the island was aware that cigarette smoking can be difficult to quit).* Difficulty quitting cigarette smoking was never an issue in the instant case, and should not have been used as a basis for overriding the jury verdict, nor as a replacement for the material issue in question, i.e. the addictive nature of cigarettes. Addiction to cigarettes is not the same as difficulty quitting smoking. As explained by plaintiffs' expert witness, Dr. James Nelson, a board certified neurologist, nicotine addiction is primarily a neurophysiological response effected in the brain. *See Trial Trans. pp. 157-8, 168.* Since defendants' expert witness did not testify as to a material point on the common knowledge defense, the District and Appellate Courts erred in concluding that his testimony had to be credited by the jury.

Due to the misconception of the *Cheseapeake* doctrine, the Court in the instant case only considered the credibility of the expert historian presented by the movant, and did not look favorably at the record for all inferences that may have been made by the jury in favor of the case presented by the non-movant. The jury had numerous reasons derived from the record to infer that Martínez' testimony was open to doubt.

First, the jury may have inferred that Martínez' testimony was implausible since, on cross examination, he could not assure that textbooks and newspapers were distributed effectively in Utuado, P.R., around the 1960s. *Trial Trans. pp. 374-6.* Further, he included material from the 1650s to prove common knowledge in the 1960s, 300 years later. *Trial Trans. p. 331.* In those instances Martínez' testimony was unconvincing, and the jury may have doubted that it was plausible on the issue of common knowledge as it pertained to Puerto Rico in the 1960s.[8] *See Little v. Brown, 243*

[8] The Appellate Court and many other courts apply the common knowledge doctrine amorphously and ubiquitously as a panacea for whatever ails manufacturers.

F. Supp. 480.492 (D.S.C. 2001) (holding that the common knowledge requirement is emasculated if a defendant may show merely that the public was aware that a product represented a health risk at some vague, unspecified and undifferentiated level.); also see Head v. Hargrave, supra at 49-50 (holding that while great weight should always be given to the opinions of those familiar with the subject, they are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge.)

Reynolds' evidentiary presentation, which consisted of three expert witnesses, provided huge knots of contradiction that could move a jury to doubt its reliability. Both experts, Dr. Fumero and Dr. Malaret, controverted Dr. Martínez' opinion in that they testified that cigarettes were **not addictive** and that it did not cause hypertension, *See Trial Trans. pp. 232, 273-4, 276, 279, 284*, while Martínez affirmed that it was addictive and extremely dangerous for the circulation.

The jury, considering the whole effect of the testimonies, may have concluded that Dr. Martinez' testimony was ineffectual since it was in direct contradiction to the testimony of the other two expert witnesses for the defendant and he never gave an expert opinion relative to the addictive nature of cigarettes as being common knowledge. Reynolds denied the addictive qualities of nicotine, and at the same time established through doubtful evidence that the addictive qualities of cigarettes were commonly known before 1969 in Puerto Rico. *See Wilks v. American Tobbaco Co., 680 So. 2d 839, 843 (1991)(A motion to impose absolute liability on manufacturer was granted after manufacturer's defense of assumption of risk was stricken because that defense was not applicable as manufacturer firmly denied the risks posed by cigarettes,).* The central theme for liability in this case rested on addiction.

Reynolds offered into evidence an exhibit, which was submitted to the jury that quoted an opinion of the Surgeon General issued in 1957 pertaining to warnings on cigarette products. *See Trans. p. 358-359*. On direct examination Martínez only commented to the jury about the first sentence in the exhibit, which was illustrated in big letters, and omitted to mention another part of the statement, which was illustrated in the exhibit in smaller font. However, the

second sentence read: *"I would agree with Dr. Heller that our position at this time, I think, relative to this whole matter, is that* ***there is a lot unknown in this area. It is a controversial area, in which some well-known scientists have opinions which differ from some of the other people*** *whom you have heard in these hearings." Id (emphasis added).* A reasonable and fair-minded jury, after reviewing the exhibit during deliberations, may have perceived the foregoing as showing a lack of common knowledge and that there was a lot unknown in the area, involving differing opinions even among the scientific community.

The lack of common knowledge about the health hazards of smoking and its addictive nature is directly evidenced by the Congressional enactment of the Labeling Act, which requires warnings in cigarette packages after January of 1966. The act was promulgated for the purpose of ensuring that the public is adequately informed that cigarette smoking may be hazardous to the health. *Pub. L. 89-92, sec. 2, 79 Stat. 288 (15 U.S.C. 1331).* In the two week hearings held by the Commerce Committee of the Senate of the United States before the passage of the Labeling Act, the requirement of a warning label was justified because "the fact that no label exists on the cigarette [packages] today is interpreted by many people to mean that this is a perfectly safe and reasonably harmless product." *Summary Statement on Cigarette Hearings, Congressional Record – Senate, April 6, 1965, p. 7088.* From the Senate discussions about the labeling of cigarettes it can be derived that a general consensus existed as to the need to educate the public about the probability of health hazards, and that "the [Commerce] Committee was convinced that too many Americans, particularly teenagers, remain uncertain of the extent of the potential hazard in smoking and that these people will not be convinced until the Federal Government, upon which they have come to rely for cautionary labeling of hazardous substances, takes affirmative action which manifests its concern." *Labeling of Cigarettes, Congressional Record – Senate, June 16, 1965, p. 13893.* Congress' expressed purpose and policy and the enactment of the Labeling Act, **should be considered at minimum as evidence that the general public was inadequately informed in regard to the health hazards of smoking in the 1960s and that there were hazards which were not common knowledge** in disposing of a

motion for judgment as a matter of law.

Warning labels required by congressional mandate were offered and admitted into evidence by both plaintiffs and Reynolds. Also the District Court read into evidence warnings required by the Labeling Act, and Reynolds' expert historian was indeed questioned about the matter. *See Trial Trans. p. 360, 410-412.* From the evidence in record about the warnings required by the Labeling Act after 1966, the Court was required to infer that the jury could reasonably conclude that Congress acted precisely to correct the lack of general knowledge about the hazards of smoking. This assumption would not be speculative. As explained above, Congress explicitly promulgated the Labeling Act for the purpose of ensuring that "the public may be adequately informed that cigarette smoking may be hazardous to your health." *Pub. L. 89-92, sec. 2, 79 Stat. 288 (15 U.S.C. 1331).* Furthermore, the same inference has been made by State and Federal Courts of various jurisdictions. *See Tompkin v. American Brands, 219 F. 3d 566, 573 (6th Cir. 2000)(holding that* ***"Given that the Labeling Act was expressly designed to adequately inform the public of the dangers of cigarette smoking, the Act implies that prior to its 1966 enactment, a substantial portion of the public was under-informed as to the specific dangers posed by smoking"****); and Little v. Brown, 243 F. Supp. 2d 480, 494 (D. SC, 2001)(holding that* ***Congress implicitly recognized the existence of no "common knowledge" when it enacted the 1966 Labeling Act).*** A fair-minded jury could have arrived at the same inference made by the Courts, and more so when one considers that knowledge of the addictive quality of nicotine was a fact not recognized by the government until the Surgeon General's Report of 1988 and is still not recognized by defendant Reynolds. Yet, the trial court weighed the significance of federal warnings as follows:

> ***"FN6 Plaintiff claims that he proffered the Labeling Act as evidence that the public was not aware of the risks of smoking in the 1960s. However, the Labeling Act was not evidence in this case. Furthermore, the mere fact that Congress passed the Labeling Act does not impute a lack of knowledge about the risks of smoking to the average consumer."*** *Cruz Vargas, supra at FN6.*

III. JURY INSTRUCTION BECAME THE LAW OF THE CASE

In the course of instructing the jury, the lower court stated, in regard to expert testimony, and without objection from either party, the following:

> ***"You should consider each expert opinion received in evidence and give it such weight as you think it deserves. You should bear in mind that the opinions of experts do not bind the Court, and they do not bind you. You, as judges of the facts, are not bound to follow the opinion of any expert if you, as judges, understand that they should not be followed. You should also bear in mind that you, as judges, are entitled to consider the education, the experience and the standing in the community of the experts, and if you understand that any opinion is not based upon sufficient education and experience or if you should include that the reasons given in support of the opinion are not sound or logical to you as judges, then, of course, you may reject the opinion. I have a very graphic way of explaining this issue of expert testimony. Assume that this case dealt with nuclear science, which it did not. Let's assume it was nuclear science, and they brought here experts on atomic energy and nuclear processes. We have no idea what this is. But we, as judges, have right to disregard testimony, even if it is that scientific, if we believe that the testimony should not be the basis for a factual finding on our part. That is one of the beauties, one of the powers of the judging function." Trial Transcript p. 457.***

This Court previously determined that a failure to object to a jury instruction does not deprive a court of jurisdiction to review the issue raised by the instruction on appeal. *City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915 (1988).* In *City of St. Louis* the Court reasoned and held that when motions for summary judgment and directed verdict raise the same issue, the failure to object to an instruction does not render the instruction the law of the case for purposes of appellate review. *Citing City of Springfield, Massachusetts v. Kibbe, 480 U.S. 257, 264, 107 S. Ct.*

1114, 1118 (dissenting opinion) (citations omitted). In the instant case Reynolds neither raised the issue via summary judgment nor by judgment as a matter of law. Moreover, Reynolds made no attempt to argue the issue in its Appellate Court brief.

Contrarily, petitioners and the Court of Appeals did address the issue of the jury instruction. Thus, the issue was clearly considered and decided by the Court of Appeals. In this setting both the trial court and the Court of Appeals became advocates. The latter court violated Rule 51 of the Federal Rules of Civil Procedure which provides that "[n]o party may assign as error the giving…[of] an instruction unless he objects thereto before the jury retires to consider its verdict." Reynolds' failure to object to the instruction or to raise the issue through motion in the trial court falls squarely within the caveat of Rule 51. Preservation of the issue on appeal would have required either an objection to the instruction or a motion for judgment as a matter of law regarding the requirement that a jury is bound to accept the unimpeached, uncontradicted testimony of an expert witness. *Puerto Rico Aqueduct & Sewer Auth. V. Constructora Lluch, Inc., 169 F. 3d 68, 80 (1st Cir. 1999); Cook v. Rhode Island Dept. of Mental Health, 10 F. 3d 17, 23-24 n.7 (1st Cir. 1993).* Without objection to the instruction or motion on the issue the instruction was the law of the case, and foreclosed and appellate disposition. *Puerto Rico Aqueduct, 169 F. 3d 80.*

Both the trial court and the Court of Appeals rested their rulings on the testimony of the same expert historian contrary to the trial court's jury instruction. Since there are circumstances where uncorroborated or irrelevant impeached testimony may be disregarded, i.e. improbable testimony, the trial court abused its authority by compelling the acceptance of Reynolds' expert testimony on the issue of common knowledge. This is the case where the instruction is not clearly erroneous. *Moore v. Murphy, 47 F.3d 8, 11 (1st Cir. 1995).*

CONCLUSION

The foregoing argument, points and authorities demonstrate that neither the trial court nor the Court of Appeals examined the record as a whole, nor read the evidence in a light most favorable to the jury verdict. *Cruz-Vargas, 348 F. 3d 275.* Thus, it was

clearly erroneous to conclude that the jury's verdict was baseless, and given the constitutional misgivings, reversal or judgement on the verdict appropriate.

THEREFORE, Petitioners request of this Court that it GRANT this Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX

United States Court of Appeals,
First Circuit.

Irene CRUZ-VARGAS, Eli Rogelio Figueroa-Cruz and Luis Rogelio Figueroa-Cruz,
Plaintiffs, Appellants,
v.
R.J. REYNOLDS TOBACCO COMPANY, Defendant, Appellee,
R.J.R. Nabisco, Inc., Nabisco Group Holdings, Defendants.

No. 02-2688.

Heard Sept. 10, 2003.
Decided Oct. 28, 2003.

*273 Archie Jennings with whom Amarilys Arocho and Anita Hill- Adames were on brief for appellants.

Robert H. Klonoff with whom Salvador Antonetti Zequeira, Luis A. Oliver, Rosalie Irizarry Silvestrini, James R. Johnson, L. Christine Buchanan, Jones Day, and Fiddler, *274 Gonzalez & Rodriguez, P.S.C., were on brief for appellee.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and HOWARD, Circuit Judge.

COFFIN, Senior Circuit Judge.

Appellants are the widow and two sons of Luis Figueroa Serrano, a longtime heavy smoker who collapsed and died suddenly after several years of suffering from hypertension. [FN1] They brought this diversity action against appellee R.J. Reynolds Tobacco Company, invoking Puerto Rico tort law and alleging that the cigarette manufacturer was responsible for Figueroa Serrano's death. The district court granted summary judgment on most of appellants' claims, allowing only the sons' failure-to-warn claims

arising prior to July 1, 1969 to go to the jury. After the jury ruled in favor of the sons, the court granted judgment as a matter of law for Reynolds, concluding that, based on the evidence at trial, the jury was compelled to find that the risks of cigarette smoking were commonly known during the relevant time period. On appeal, the sons challenge the judgment as a matter of law. All three appellants challenge the summary judgment ruling to the extent that it found all post-1969 failure-to-warn claims preempted by federal legislation. Irene Cruz Vargas also challenges the court's ruling that the statute of limitations barred her claims. We affirm both of the district court's rulings on the basis of common knowledge, making it unnecessary to reach appellants' other arguments.

FN1. Irene Cruz Vargas is the widow of the decedent; Luis Rogelio Figueroa Cruz and Eli Rogelio Figueroa Cruz are the sons.

I. *Background*

The following facts are undisputed. The decedent was a native Spanish speaker with no written or verbal English proficiency. He seldom watched television and rarely, if ever, read newspapers or magazines. Figueroa Serrano was a longtime heavy smoker with a documented medical history of hypertension, including several hospitalizations occurring between 1994 and his death on October 18, 1999. At the request of the family, no autopsy was performed.

Appellants filed this suit against Reynolds in October of 2000, alleging that decedent's smoking was responsible for his hypertension, which in turn was a substantial factor in his death. Appellants brought a series of negligence and strict liability claims under Puerto Rico law, including failure to warn and design defect. They furthermore argued that Reynolds failed to comply with its duty, which they alleged to be implicit in federal regulation, to print Spanish language warnings on cigarette packages sold in Puerto Rico.

The district court granted Reynolds summary judgment on all of Irene Cruz Vargas' claims, finding them time-barred. *Cruz Vargas*

v. R.J. Reynolds Tobacco Co., 218 F.Supp.2d 109, 116 (D.P.R.2002). With respect to the sons' claims, the district court granted Reynolds' motion for summary judgment on claims of defective design and the inherent dangerousness of tobacco and cigarettes. *Id.* at 121. The court denied Reynolds' motion as to the failure- to-warn claims arising prior to July 1, 1969, the date that the amendments to the Federal Cigarette Labeling and Advertising Act went into effect. [FN2] *Id.* at 117. ***275** The court found failure-to-warn claims based on conduct after July 1, 1969 preempted by the Labeling Act.

> FN2. The Labeling Act mandated cautionary warnings on cigarette packages beginning in 1965. The amendment, effective July 1, 1969, both strengthened the language of the warnings and included preemptive language broader in scope than that of the original act. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

The sons proceeded to a jury trial on their remaining claims. Reynolds defended at trial primarily based on evidence that the risks of cigarette smoking were common knowledge prior to 1969, and thus no duty to warn existed. A jury found in favor of both sons, awarding each damages in the amount of $500,000. The district court subsequently granted Reynolds' motion for judgment as a matter of law, under Fed.R.Civ.P. 50(a), finding that appellants failed to offer any evidence demonstrating that the ordinary consumer lacked knowledge of the health risks and addictive nature of smoking. The district court held that the jury was not entitled to reject the unimpeached, uncontradicted testimony of Reynolds' expert witness, who stated his opinion that the Puerto Rican public was aware of such hazards prior to July 1, 1969.

Appellants allege the district court's action was improper because the evidence presented by Reynolds was susceptible to conflicting inferences. In addition, they contest summary judgment on two grounds: first, that the court erred in determining that the claims accrued at the time appellants learned of Figueroa Serrano's injuries, rather than on the actual date of his death; second, that it

further erred in refusing to find that the absence of warnings in Spanish rendered the required warnings of the Labeling Act ineffectual.

II. *Judgment as a Matter of Law*

We review the grant of judgment as a matter of law de novo. *Hochen v. Bobst Group, Inc.*, 290 F.3d 446, 453 (1st Cir.2002). We examine the record as a whole, reading the evidence in the light most favorable to the jury verdict. *Reeves v. Sanderson Plumbing Prod.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Although we may not weigh the credibility of witnesses, *id.*, we assume the veracity "of any admissions made and stipulations entered into by the party opposing the Rule 50 motion...as well as any evidence derived from disinterested witnesses that has not been contradicted or impeached." *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 69 (1st Cir.2002) (*quoting Alvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co.*, 152 F.3d 17, 23 (1st Cir.1998)). Only if "applying these standards, the evidence does not permit a reasonable jury to find in favor" of appellants will we affirm the district court. *Brennan v. GTE Gov't Systems Corp.*, 150 F.3d 21, 26 (1st Cir.1998).

A. *Evidence Regarding Common Knowledge*

This case calls for us to evaluate application of the common knowledge doctrine in the context of tobacco litigation. The doctrine stems from the principle that a manufacturer cannot be held liable under either strict liability or negligence for failure to warn of a danger commonly known to the public. *See, e.g., Guevara v. Dorsey Labs., Div. of Sandoz, Inc.*, 845 F.2d 364, 367 (1st Cir.1988) ("The duty to warn in general is limited to hazards not commonly known to the relevant public."); *Aponte Rivera v. Sears Roebuck*, 44 P.R. Offic. Trans. 7, 144 D.P.R. 830 (1998) ("[A] manufacturer need not warn of a hazard if the average consumer ordinarily has knowledge of the dangers of the product.").

To state a claim for negligence under the law of Puerto Rico, a plaintiff must prove that "(1) defendant owed a duty to prevent the

harm by conforming to a reasonable *276 standard of conduct; (2) defendant breached that duty through a negligent act or omission; and (3) the negligent act or omission caused the plaintiff's harm." *Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co.*, 958 F.2d 1169, 1171 (1st Cir.1992). *See also* 31 L.P.R.A. § 5141 (1991). Puerto Rico has also adopted, by judicial act and with a slight modification, the strict liability principles embodied in section 402A of the Restatement (Second) of Torts. *Perez-Trujillo v. Volvo Car Corp.*, 137 F.3d 50, 53 n. 5 (1st Cir.1998) (clarifying that claimant in Puerto Rico must show the product was "unsafe" rather than "unreasonably dangerous"); *Rivera Santana v. Superior Packaging, Inc.*, 1992 P.R.-Eng. 754830 *3 n. 4, 132 D.P.R. 115 (1992) (noting that Puerto Rico has adopted U.S. common law products liability principles to "fill a gap in our body of laws").

A products liability plaintiff alleging failure to warn must prove "(1) the manufacturer knew, or should have known of the risk inherent in the product; (2) there were no warnings or instructions, or those provided were inadequate; (3) the absence of warnings made the product inherently dangerous; (4) the absence of adequate warnings or instructions was the proximate cause of plaintiff's injury." *Aponte Rivera*, 44 P.R. Offic. Trans. at 6. Under the common knowledge doctrine, however, a defendant neither breaches a duty nor causes the product to be inherently dangerous when the allegedly omitted warning concerns a danger of which the public is well aware.

In an ordinary case on summary judgment or judgment as a matter of law, plaintiffs point to evidence suggesting a genuine dispute of a material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (standard for judgment as a matter of law mirrors that of summary judgment, and thus to withstand a motion under either inquiry, the evidence must indicate "sufficient disagreement to require submission to a jury"). In other cases in which common knowledge was at issue, plaintiffs have successfully defended against summary judgment motions by pointing to evidence suggesting such a genuine dispute. *See, e.g., Tompkin v. American Brands*, 219 F.3d 566, 568-70 (6th Cir.2000) (plaintiff's expert reviewed periodicals, polls, and industry and

government reports from the relevant time period, concluding that smokers were not adequately informed of the risks); *Little v. Brown & Williamson Tobacco Corp.*, 243 F.Supp.2d 480, 492-495 (D.S.C.2001) (plaintiff's "sample authorities," including journals, reports and polls, created a jury question regarding common knowledge). Appellants here take a different approach, contending that they did not have a burden to produce any evidence at all. The crux of appellants' entreaty on appeal is that neither the strict liability nor the negligence claim requires any affirmative showing, and thus the burden rested entirely on Reynolds. Whether or not this is a correct view of the law, after searching the record we have found no evidence which supports appellants' allegations that there was a lack of common knowledge and thus we are compelled to find that Reynolds met its burden in any event.

Appellants argue that Reynolds' experts presented conflicting testimony on common knowledge, which permitted the jury to reach the conclusion it did. This contention, however, is not borne out by review of the trial transcript. Reynolds' defense consisted of three witnesses. The testimony of the first two had no relevance to the specific common knowledge inquiry. Dr. Herman Melavet, a medical internist, testified as to the dispute in the medical community as to the precise causal link, if any, between smoking and hypertension. He also suggested that the decedent may have died from a dissecting aneurysm. [FN3] ***277** The testimony of Dr. Juan Fumero, a psychiatrist, concerned contemporary psychiatric understanding of nicotine dependence.

FN3. As explained above, no autopsy was performed and thus the cause of death cannot be precisely ascertained.

Appellants extract a discrete portion from the testimony of Dr. Fumero in support of their argument that the jury was presented with contradictory evidence undermining common knowledge. Appellants fault Dr. Fumero for his opinion that regardless of the term used to describe a smoking habit, be it "addiction," "nicotine dependence," or "substance abuse," an individual committed to quitting will be able to do so. But to say that one can abandon a habit sheds no light on whether the prevalence of the habit was a

matter generally known. [FN4] Similarly, Dr. Melavet's testimony that cigarette smoking did not cause hypertension says nothing about the state of common knowledge.

FN4. Appellants highlight the following portion from Dr. Fumero's testimony on direct examination:

> Q: Is there anything in cigarettes that would render a person unable to understand that he is smoking and to make a decision to quit?
> A: No, nothing at all.
> Q: There is a term addiction that has been bandied about here which means that a person is not competent to change their behavior that he or she is said to be addicted to?
> A: No, you can call it addiction; you can call it nicotine dependence; you can call it substance abuse. It doesn't matter how you call it, there is nothing in it that can impair you from quitting if you choose to quit.

Only Professor Luis Martinez, an expert in Carribean social history, testified on the precise issue of common knowledge, and he concluded by stating his opinion that "the average consumer in Puerto Rico during the 1950's, during the 1960's" was aware both of health risks, such as cancer and cardiovascular disease, and that "smoking was or could be difficult to quit." Appellants contend that the jury permissibly rejected Martinez' testimony as biased and incredible. Appellants' bias argument relies on the U.S. Supreme Court's decision in *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 19 S.Ct. 233, 43 L.Ed. 492 (1899), which held that "the mere fact that a witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted as a question of fact." *Id.* at 408. Case law in this circuit, however, clarifies that mere payment to an expert by a party does not raise a question of bias. *Quintana-Ruiz*, 303 F.3d at 76 (finding that witnesses' status as "paid outside experts" did not gainsay credibility). [FN5]

FN5. Appellants' attempt to bring Martinez' testimony under the rubric of *Sonnentheil* by alleging a "fraudulent tinge" finds no support in the record.

Martinez' testimony is furthermore neither improbable nor contradicted, thus falling under the established principle that "testimony concerning a simple fact, capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross- examination, must be permitted to stand." *Id.* at 75 (quoting *Chicago, Rock Island & Pac. Ry. Co. v. Howell*, 401 F.2d 752, 754 (10th Cir.1968)). This rule is particularly applicable to the "testimony of an expert witness ... where the testimony bears on technical questions ... beyond the competence of lay determination." *Quintana-Ruiz*, 303 F.3d at 76-77 (quoting *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir.1970)(internal citation omitted)(ellipses in original). This is such a case. The "common knowledge" defense is assessed objectively [FN6], and, despite the nomenclature, it is a technical question involving methods, financing, and sources of research beyond the competence of lay determination, at least when pertaining to history forty or fifty years removed from the time of trial.

FN6. Courts construing Section 402A of the Restatement (Second) of Torts, which is applicable here, have found the determination of common knowledge to be purely objective. *See e.g. McLennan v. American Eurocopter Corp.*, 245 F.3d 403, 428 (5th Cir.2001) ("Whether information about a risk is common knowledge is an objective inquiry and the user's knowledge is not dispositive on the issue."); *Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir.2000) (section 402A involves an objective test "and is not dependent upon the knowledge of the particular injured consumer"); *Little*, 243 F.Supp.2d at 492 (D.S.C.2001) ("[Plaintiff's] knowledge or lack of knowledge concerning the dangers of cigarettes is irrelevant for purposes of this analysis.").

***278** Martinez' research followed an accepted method of historical analysis and drew on a breadth of sources--such as newspapers, polls, surveys, school curricula, films, and reports by various public interest organizations-- contemporaneous with the time period at issue in the case. [FN7] Given his explanation of the sources and method, Martinez' opinions are not improbable or unbelievable, and

the transcript reveals no inconsistencies in his direct testimony.

FN7. In total, Professor Martinez' presentation included 58 slides summarizing his sources. A sampling of the sources on addiction and health risks, all dating from the 1950s and 1960s, includes: articles from the Spanish language Reader's Digest, including "Nicotine, the Smoking Enigma," "How I Quit Smoking," "Dreadful Lung Cancer on the Rise;" a 1961 article in the San Juan Star titled "Two City Studies Show Death Rate Higher for Smokers;" two editorial cartoons from the daily newspapers El Mundo and El Imparcial (one relating to addiction, the other to health risks); an ad in El Imparcial about the difficulties of quitting, an article in El Mundo lamenting "how difficult it is to quit!" and several other El Mundo articles discussing a major study of the risks of smoking, completed in 1957, that spurred increased government interest in further investigation. He also testified to extensive coverage in newspapers following the release in 1964 of a key Surgeon General's report on smoking hazards.

Cross examination neither brought to light any contradictions undermining Martinez' opinion nor revealed information suggesting a lack of common knowledge. In an effort to discredit Martinez' sources, appellants' counsel suggested that the semantical distinction between a "poll" and a "survey" had factual significance. Martinez, however, effectively explained his understanding of the difference between the two without raising doubt as to the validity of either, and further clarified the legitimacy of population sampling in the surveys and polls on which he relied. Counsel also probed issues regarding the circulation and availability of newspapers and magazines in Figueroa Serrano's neighborhood in particular, but the court sustained an objection to this line of questioning as improperly suggesting that common knowledge has a subjective component.

In a final effort to salvage the verdict, appellants rely on an instruction that they claim allowed the jury to disregard Martinez' testimony. The jury was told that "[y]ou should consider each expert opinion received in evidence and give it such weight as you think it deserves. You should bear in mind that the opinions of

experts do not bind the Court, and they do not bind you." Construing this language as carte blanche for a total rejection of Martinez' testimony is a misreading of our precedent. For it makes clear that the jury could not reject the substantive, uncontradicted and unimpeached evidence upon which Martinez' opinion was based. *See* C. Wright & A. Miller, 9A *Federal Practice and Procedure* § 2527, at 286 n. 9 (1995 & Supp.2003) (citing *Quintana-Ruiz*, 303 F.3d at 75, as holding that the jury must accept the uncontradicted and unimpeached testimony of even an interested witness). While the instruction permitted the jury, in the event of conflicting evidence, to reject Professor Martinez' resolution of the conflict, it did not allow the jury to reject the only evidence presented on the issue for no apparent reason.

***279** Like the testimony in *Quintana-Ruiz*, Martinez' presentation was not "improbable, inconsistent, or otherwise facially unbelievable." Because Martinez' testimony as to the nature, content and variety of dissemination of information about the perils of smoking was uncontradicted and suffered no obvious defect inviting impeachment, the jury had no basis to find other than that common knowledge of smoking's hazards existed in Puerto Rico before July 1, 1969. [FN8]

FN8. Our references to common knowledge are not without limit of time. We hold only that the evidence at trial required the jury to find that common knowledge existed at least by the mid-1960s, the earliest time at which decedent may have begun smoking.

C. *Exclusion of the 1988 Surgeon General's Report*

To the extent appellants' case lacked critical evidence on the common knowledge issue, appellants argue this stemmed from refusal of the district court to admit a 1988 Surgeon General's report on the addictiveness of nicotine. When pressed by the judge regarding the relevance of the 1988 report to claims prior to July 1, 1969, appellants' counsel offered only that "in regard to the issue regarding addiction, Your Honor, the matter concerning [decedent] is that over the years he did become addicted in 1988. It settled that issue." Appellants urge us to consider additional remarks in the

proffer which merely indicated that in 1964 addiction and dependence were used interchangeably and that the 1988 report standardized the definition. [FN9] They now claim the report demonstrates that the addictive nature of smoking could not have been common knowledge until at least 1988. Contrary to appellants' argument, these further remarks by no means signify that common knowledge did not exist until 1988.

FN9. Counsel's complete proffer was:

> "Well in regard to the issue regarding addiction, Your Honor, the matter concerning Mr. Luis Serrano is that over the years he did become addicted in 1988. It settled that issue. What counsel is speaking of, there was a change in the definition of the Surgeon General's Report from 1964 regarding addiction versus defendant's dependence. Sometimes they used it interchangeably back in 1964. The World Health Organization indicated that they believed that cigarette smoking was addictive or people became dependent upon it over those years. They asked for some more studies, and they came out with the report in 1988."

Moreover, counsel's offer of proof did not reveal that this was the intended purpose behind admitting the report. The issue was thus not preserved. *See Clausen v. Sea-3, Inc.*, 21 F.3d 1181, 1194 (1st Cir.1994) (quoting *Tate v. Robbins & Myers, Inc.*, 790 F.2d 10, 12 (1986)) ("[I]f evidence is excluded because it is inadmissible for its only articulated purpose, the proponent of the evidence cannot challenge the ruling on appeal on the ground that the evidence could have rightly been admitted for another purpose." (citations omitted)). The district court properly perceived the potential for jury confusion, given that the trial was limited to claims prior to July 1, 1969. Counsel had the opportunity to allay such concerns and enunciate a specific relevant use for the report, but failed to do so. [FN10]

FN10. Despite appellants' urging, the decision in *Perez-Trujillo v. Volvo Car Corp.*, 137 F.3d 50 (1st Cir.1998), in which we vacated the district court's exclusion of eyewitness testimony, does not suggest an opposite result. Exclusion of eyewitness testimony

contemporaneous in time with the exact events at issue is distinguishable from exclusion of this report on general subject matter published nearly twenty years after the relevant time period in the case.

In conclusion, we affirm the district court's grant of judgment as a matter of ***280** law in favor of Reynolds. Based on the evidence presented, no reasonable jury could have found a lack of common knowledge during the relevant time period regarding the health hazards and habit-forming nature of cigarettes.

III. *Demand for New Trial on Post-1969 Claims*

Appellants also appeal from the grant of summary judgment in favor of Reynolds on post-1969 failure-to-warn claims, which the district court found preempted by the terms of the Labeling Act. *Cruz Vargas*, 218 F.Supp.2d at 117. As with judgment as a matter of law, we review the district court's grant of summary judgment de novo and draw all reasonable inferences in favor of the nonmoving party. *Sparks v. Fidelity Nat'l. Title Ins. Co.*, 294 F.3d 259, 265 (1st Cir.2002). Furthermore, we may affirm the district court "on any ground revealed by the record." *Morales-Vallellanes v. Potter*, 339 F.3d 9, 18 (1st Cir.2003).

Appellants offer the intriguing suggestion that our preemption analysis consider the "linguistic particularity" of Puerto Rico in giving effect to the clearly expressed Congressional intent that warnings required by the Labeling Act be deemed adequate to inform the public of cigarettes' hazards. *See* 15 U.S.C. § 1331(1) (1998). Reynolds, on the other hand, points to case law analyzing the preemptive scope of the Labeling Act and argues that any state law tort action based on inadequate package warnings falls under the rubric of these decisions. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 488 n. 9, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (text of the Labeling Act "specified the precise warning to smokers that Congress deemed both necessary and sufficient"); *Cipollone v. Liggett Group Inc.*, 505 U.S. 504, 524, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (failure-to-warn claims preempted to the extent such claims require a showing that advertisement or promotion of cigarettes required "additional, or more clearly stated, warnings");

Palmer v. Liggett Group, Inc., 825 F.2d 620, 629 (1st Cir.1987) (describing "state tort liability" as "seriously disruptive to the congressionally calibrated balance of national interests"). We need not decide, however, if appellants' argument defeats preemption because we have already determined that the jury was required to believe Reynolds' uncontradicted and unimpeached testimony on the existence of common knowledge in Puerto Rico prior to July 1, 1969. It is thus axiomatic that proof of such common knowledge also stymies all subsequent failure-to-warn claims. [FN11]

FN11. In any event, we suggest that the argument regarding the language of warnings is best entertained by Congress, and not the courts. *See Aponte Rivera*, 44 P.R. Offic. Trans. 10, 144 D.P.R. 830 (P.R.1998), (Negrón Garcia, J., dissenting) ("[I]t is incumbent upon the Legislative Assembly and the Secretary of Health, not upon this Court, to make the pertinent standardization [of the language of warnings], to set it forth in a statute or regulation, and to define what are sufficient instructions and warnings."); *Ramirez v. Plough*, 6 Cal.4th 539, 550, 25 Cal.Rptr.2d 97, 863 P.2d 167 (1993) ("Defining the circumstances under which warnings or other information should be provided in a language other than English is a task for which legislative and administrative bodies are particularly well suited.").

For the foregoing reasons, we affirm the district court's grant of summary judgment and judgment as a matter of law in favor of Reynolds.

Affirmed.

348 F.3d 271, 62 Fed. R. Evid. Serv. 1205, Prod.Liab.Rep. (CCH) P 16,782

UNITED STATES DISTRICT COURT DISTRICT OF PUERTO RICO

ELI ROGELIO FIGUEROA CRUZ and LUIS ROGELIO FIGUEROA CRUZ
Plaintiffs,
v.
R.J. REYNOLDS TOBACCO COMPANY; R.J.R. NABISCO, INC.; NABISCO GROUP HOLDINGS,
Defendants.

Civil No. 00-2334

OPINION *AND* ORDER

Plaintiffs, Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz, brought the present diversity action against Defendants, R.J. Reynolds Tobacco Company ("Reynolds"), R.J.R. Nabisco, Inc. ("R.J.R. Nabisco"), and Nabisco Group Holdings ("Nabisco Holdings") **FN1** alleging state law tort claims pursuant to 31 L.P.R.A. § 5141 (1991 & Supp. I 1998) for the death of their father. Docket Document No. 25.

Following a trial, on September 25, 2002, a jury returned a verdict in favor of Plaintiffs. Defendants moved for judgment as a matter of law and Plaintiffs opposed the motion. We conclude that the jury's verdict was not supported by the evidence and, therefore **2*** GRANT Defendants' motion for judgment as a matter of law. See FED. R. CIV. P. 50.

FN 1 Future references, to "Defendant" refer to Defendant R.J. Reynolds.

I. Procedural History

Plaintiffs, Irene Cruz Vargas, Eli Rogelio Figueroa Cruz, and Luis Rogelio Figueroa Cruz filed the initial complaint on October 17, 2000, Docket Document No. 1, and submitted an amended complaint on August 20, 2001. Docket Document No. 25. Plaintiffs are the wife and children of Luis Rogelio Figueroa

Serrano ("the decedent"), who unexpectedly died on October 18, 1999. Plaintiffs' complaint alleged negligence and strict liability claims pursuant to 31 L.P.R.A. S 5141. Id. Specifically, Plaintiffs averred that Defendant Reynolds' cigarettes were defectively designed because they caused the decedent's addiction to nicotine, hypertension, and death. Plaintiffs also asserted that the health warnings on Defendant Reynolds' cigarette packages were inadequate to warn the decedent of the risks of smoking, and that Defendant Reynolds had a duty to print Spanish health warnings on cigarette packages sold in Puerto Rico. Id.

On June 18, motion for summary 2002, we granted, in part, Defendant Reynolds' judgment on the grounds that: (1) Plaintiff Irene **3*** Cruz Vargas' claims were time-barred; (2) Plaintiffs' post-1969 failure-to-warn claims were preempted by the Federal Cigarette Labeling andAdvertisingAct ('the Labeling Act'), 15 U.S.C. 1331-1341 (1994 & Supp. 2001); and (3) Defendant Reynolds' cigarettes were not defectively designed under Puerto Rico law. Docket Document 6 No. 87.

Defendants filed a second, belated motion for summary judgment, which we declined to consider. Docket Document No. 139.

Plaintiffs Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz proceeded to trial, asserting state law tort claims of negligence and strict liability against Defendant Reynolds for its alleged failure to warn their deceased father of the health risks and addictive nature of smoking prior to July 1, 1969.

Following the presentation of Plaintiffs' evidence at trial, Defendants moved for judgment as a matter of law pursuant to Fed. R. 18 19 Civ. P. 50. We deferred ruling on the motion until the jury reached its verdict.

The jury found in favor of Plaintiffs and awarded each Plaintiff damages in the amount of $500,000.

Defendant Reynolds moves for judgment as a matter of law on the following grounds: (I) Plaintiffs failed to prove that the decedent **4*** began smoking Winston cigarettes prior to July 1, 1969; (2) Plaintiffs did not prove that Defendant Reynolds had a duty to warn the decedent of the risks associated with smoking; (3) assuming a duty to warn existed, Plaintiffs have not proffered sufficient evidence to show that Defendant breached its duty; (4)

Plaintiffs have not established that Defendant Reynold's failure to provide Spanish language warnings prior to July 1, 1969 caused the decedent's death 30 years later; and (5) Plaintiffs have failed to show that if Defendant Reynolds had provided additional warnings prior to July 1, 1969, the decedent would have heeded those warnings and avoided his injuries.

On September 30, 2002, Plaintiffs opposed the motion, arguing that they had sufficiently established that: (1) the decedent's smoking was a substantial factor in his death; and (2) the dangers of smoking were not known to the ordinary consumer during the relevant time period. Plaintiffs further assert that they did not need to prove that the decedent would have heeded additional warnings. Plaintiffs also dispute the jury's finding that Plaintiff Luis Rogelio Figueroa Cruz's claims were time-barred, and they filed a Federal Rule of Civil Procedure 49(a) motion to this effect on October 7, 2002.

5* Defendant tendered a reply to Plaintiffs' opposition on October 8, 2002.

II.Factual Synopsis

This court has carefully reviewed the evidence adduced at trial, and we present the following factual summary in the light most favorable to Plaintiffs, and with all reasonable inferences drawn in his favor. Hochen v. Bobst Group, Inc., 290 F.3d 446, 453 (1st Cir. 2002) (explaining standard for judgment as a matter of law). In viewing the evidence in a Rule 50 motion, we "disregard all evidence favorable to the moving party that the jury is not required to believe. . . . [We] give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses.'" Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (internal citations omitted). "We assume the veracity . . . of any admissions made and stipulations entered into by the party opposing the Rule 50 motion." See Quintana-Ruiz v. Hyundai Motor Corp., 303 F. 3d 62, 69 (lst Cir. 23 2002).

The decedent, Luis Rogelio Figueroa Serrano, was born on August 28, 1951, and lived in Utuado, Puerto Rico. He worked as

a 6* mechanic, tow truck driver, and a public bus driver. His family perceived him to be a strong, healthy person during most of his life. (Tr. 7, 46, 64, 66). The decedent's primary language was Spanish. He could not read, write, or speak English (Tr. 43). The decedent did not typically read newspapers or magazines and did not watch much television. (Tr. 7, 43, 45).

The decedent began smoking Winston cigarettes as early as 1961. (Tr. 10). In the early 1970's, the decedent smoked at least a pack of Winston cigarettes a day. (Tr. 31). By the time his second child was born in 1979, the decedent smoked a cigarette once every five or ten minutes. (Tr. 78). In the early 1990's, the decedent would get up once or twice a night to have a cigarette. (Tr. 79). By 1994, he smoked two to three packs of Winston cigarettes a day. (Tr. 114). Although the decedent apparently tried to quit many times, unable to do so. (Tr. 43, 63, 77).

The decedent was five feet nine inches tall and weighed he was between 240 and 250 pounds. See Admitted Facts, Pretrial Order, paragraph I. The decedent had a family history of hypertension and heart disease. Id at paragraph 0.

In 1994, the decedent was hospitalized for fifteen days for high blood pressure. (Tr. 80). Following this initial incident, the 7* decedent was hospitalized between three and six times for high blood pressure, including once a few days before he died. (Tr. 73, 84). The decedent's wife testified that the decedent followed his doctor's advice regarding his hypertension medication, always went to his medical appointments, and always took his medication. (Tr. 82).

The evidence confirms quite clearly that the decedent suffered from severe, uncontrolled hypertension and that his doctors warned him that not taking his medication would be lethal. See Admitted Facts, Pretrial Order, paragraphs G, P, and Q.

The decedent passed away suddenly on October 18, 1999. At paragraph J. On the date of his death, the decedent was forty-eight 14 years old. See Plaintiffs' Exh. 1. At the request of Plaintiff Luis Rogelio Figueroa Cruz, no autopsy was performed. Admitted Facts, Pretrial Order, paragraph L. The official cause of death was listed as essential (primary) hypertension. See Plaintiffs' Exh. 1.

Plaintiffs' expert witness, Dr. James Nelson, testified that smoking, diet, lack of exercise and noncompliance with his doctor's

orders contributed to the decedent's hypertension and death. (Tr. 160). Dr. Nelson opined that the amount the decedent smoked was a factor in making his blood pressure high and difficult to control. (Tr. 163). He further testified that although high blood pressure **8*** runs in the decedent's family, it is likely that the decedent would have been able to control his blood pressure if he had not smoked so much during his lifetime. (Tr. 164). Dr. Nelson smoke was a substantial factor in [the decedent's] concluded that blood pressure and in the cause of his death." (Tr. 163).

III. Rule 50 Standard

Rule 50 (a) (1) provides that:

If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. FED. R. CIV. P. 50 (a) (1).

In deciding a Rule 50 motion, courts review all the evidence in the record. Reeves, 530 U.S. at 150.

[Wle examine the evidence and all fair inferences in the light most favorable to the non-movant and determine whether the non-movant has offered 'more than a mere scintilla of evidence,' warranting the submission of the issue to the jury. We 'may not consider the credibility of witnesses, resolve conflicts in testimony, or evaluate the weight of the evidence.' **9*** Hochen, 290 F.3d at 453 (internal citations omitted). "We resolve all credibility issues in favor of the verdict. . . . The evidence may be entirely circumstantial, and need not exclude every hypothesis of innocence; that is, the factfinder may decide among reasonable interpretations of the evidence." White v. N.H. Dept of Corrs., 221 F.3d 254, 259 (1st Cir. 2000) (internal citation omitted). "Overriding a jury verdict is warranted only if the evidence 'is so one-sided that the movant is

plainly entitled to judgment, for reasonable minds could not differ as to the outcome.'" Colasanto v. Life Institucion. Co. of N. Am., 100 F.3d 203, 208 (1st Cir. 1996) (internal citation omitted).

IV. Analysis

A. Plaintiff Luis Rogelio Figueroa Cruz

At the charge conference held in chambers on September 25, 2002, the parties agreed to have the following question in the verdict form: "(5) Luis Rogelio Figueroa Serrano died on October 18, 1999, did Plaintiffs know or should have known before that date that smoking could lead to their father's death?" The parties agreed that question five would be controlling on the issue of timeliness. If the jury answered "yes" to question five of the verdict form, Plaintiff Luis Rogelio Figueroa Cruz's action would be time-barred. **10*** Since the jury answered "yes" to question five, Plaintiff Luis Rogelio Figueroa Cruz's claims were necessarily time-barred.**FN2**

FN2 Puerto Rico does not have a wrongful death statute. Rather, claims for emotional damage caused by a family member's physical injury or death are governed by 31 L.P.R.A. § 5141. In Puerto Rico tort cases "the period of a cause of action begins to run as of the moment the aggrieved party learned or had knowledge of the damage and could institute the action." Sanchez v. Elec. Power Auth., 142 D.P.R. 880, 1997 P.R. Eng. 878520 (1997).

Under Plaintiffs' theory of the case, thirty years of smoking caused the decedent's addiction and contributed to his hypertension and death. The jury found that Luis Rogelio Figueroa Cruz was aware of the decedent's smoking-related injuries before the decedent died, and that he was in a position to file a claim earlier than the date in which his father died.

Plaintiff Eli Rogelio Figueroa Cruz's claims are not time-barred because he was a minor when he filed the complaint. See 32 L . P . R . A . 254 (1990). Pursuant to section 254, the time that Plaintiff Eli Rogelio Figueroa Cruz was a minor is not added to the statute of a limitations period.

For that reason, counsel agreed on the record at the time the verdict was announced that Luis Rogelio Figueroa Cruz's case was

time-barred and no recovery could be sustained based on the jury's affirmative answer to question five.

Counsel for Plaintiffs had second thoughts on this matter and Plaintiff Luis Rogelio Figueroa Cruz filed a motion pursuant to Federal Rule of Civil Procedure 49(a), in which he asserts that the statute of limitations did not begin to run until the decedent died **11*** on October 18, 1999, and that since he filed the present action within one year of the decedent's death, his action is timely.

We need not decide at this time Plaintiff Luis Rogelio Figueroa Cruz's post-trial motion based on Federal Rule of Civil Procedure 49 (a) . Even if Luis Rogelio Figueroa Cruz's claims are not time-barred, Defendant Reynolds would be entitled to judgment as matter of law for the same reasons we explicate infra with regards Rogelio Figueroa Cruz.

B. Plaintiff Eli Rogelio Figueroa Cruz

1. Leqal Framework

Plaintiff Eli Plaintiff Eli Rogelio Figueroa Cruz **FN3** asserts claims of negligence and strict liability under 31 L.P.R.A. § 5141. Plaintiff contends that Defendant Reynolds failed to warn his father of the risks of smoking prior to July 1, 1969 and that Defendant's failure to warn was a substantial contributing factor in his father's death on October 18, 1999.

Under Puerto Rico law, a product may be found defective "if the manufacturer or seller fails to provide the user with adequate warnings or instructions on the dangers or risks inherent to its handling or use." Rivera v. Superior Packaginq, Inc., 132 D.P.R. 115,

FN3 Future references to "Plaintiff" allude to Plaintiff Eli Rogelio Figueroa Cruz.

12* 1992 P.R. Eng. 754830 (1992). In a strict liability failure-to-warn case, a plaintiff must prove by a preponderance of the evidence that:

> (1) the manufacturer knew, or should have known of the risk inherent in the product; (2) there were no warnings

> or instructions, or those provided were inadequate; (3) the absence of warnings made the product inherently dangerous; (4) the absence of adequate warnings or instructions was the proximate cause of plaintiff's injury.

Aponte Rivera v. Sears Roebuck de P.R., Inc., 145 D.P.R. 245, 1998 P.R. Eng. 324486 (1998) (internal citations omitted); see also LEWIS BASS, PRODUCT LIABILITY § 4 : 9 (2d ed. 2001) (explaining that a manufacturer safe use hazardous by those dangerous under an affirmative duty to give warnings for the of a product where the manufacturer can foresee that characteristics of the product are not likely to be known using the product, and the product will be inherently without that knowledge).

In Puerto Rico, negligence is "the failure to exercise due diligence to avoid foreseeable risks." Malav6-F6lix v. Volvo Car Corp., 946 F.2d 967, 971 (IST Cir. 1991) (citing Jimenez v. Peleqrina Espinet, 112 D.P.R. 700 (1982)) . To establish a claim of negligence, Plaintiffs must prove that: " (1) defendant owed a duty to prevent the harm by conforming to a reasonable standard of conduct; (2) defendant breached that duty through a negligent act or omission; and (3) the **13*** negligent act or omission caused the plaintiff's harm." Tokio Marine & Fire Ins. Co., Ltd. v. Grove Manuf. Co., 958 F.2d 1169, 1171 (ISt Cir. 1992).

2. Defendant Reynolds' Duty

We examine first whether Plaintiff has met his burden of establishing that Defendant Reynolds had a duty to warn of the health risks and addictive nature of smoking prior to July 1, 1969.

Defendant Reynolds argues that under Puerto Rico law, the duty to warn extends only to those hazards that are not commonly known to the relevant public. Defendant maintains that Plaintiff has failed to adduce any evidence demonstrating that the ordinary consumer did not know of the dangers of smoking cigarettes in the 1950s and 1960s, and that this court must find as a matter of law that Defendant had no duty to warn of the risks of smoking during that time.

Plaintiff contends that by enacting the Labeling Act, Congress implicitly recognized that the public did not know of the risks of

smoking and needed to be warned. Plaintiff claims that he proffered the Labeling Act as evidence of Congress1 intent.

In Puerto Rico, "[a] manufacturer need not warn of a hazard if the average consumer ordinarily has knowledge of the dangers of the product." Aponte Rivera, 154 D.P.R. 245 (internal citation omitted); **14*** see also Guevara v. Dorsey Labs., 845 F.2d 364, 367 (1st Cir. 1988) ("The duty to warn in general is limited to hazards not commonly known to the relevant public."). This principle applies in strict liability and negligence cases. FN4 See AM. LAW OF PRODUCTS LIABILITY § 32.68 (Timothy E. Travers ed., 3d ed. 1987); Restatement (Second) of Torts 6 7 §§ 388, 402A (1965 & Supp. 2002).

FN4 The jury was charged on the basis of these stipulated statements of 2 5 law pursuant to 31 L.P.R.A. § 5141 and the Civil Code of Puerto Rico. There was no objection to the substantive matters of the charge. The jury 26 instructions are attached as Appendix A.

"Under this standard, warnings are to be construed with the 'average user' or 'reasonably prudent person' in mind, not the knowledge available to the particular plaintiff . " AM. LAW OF PRODUCTS 11 LIABILITY 32.68; see also Guevara, 845 F.2d at 367.

Therefore, as part of his burden in both his strict liability and negligence claims, Plaintiff had to show that the ordinary 'consumer did not have knowledge of the risks of smoking before July 16 1, 1969.

3. Sufficiency of the Evidence

The jury found that Defendant Reynolds had a duty to warn of the risks of smoking prior to July 1, 1969. We examine whether the evidence supported such a finding. Specifically, we evaluate whether Plaintiff proffered sufficient evidence to support the jury's finding **15*** that the ordinary consumer was not aware of the risks of smoking prior to 1969.

Plaintiff did not proffer any evidence as to consumers' knowledge about the risks of smoking in the 1960s. **FN5** The only evidence in the record as to public awareness about smoking risks

in the 19501s and 1960ts is the testimony of Defendant Reynolds' expert historian, Dr. Martinez. Dr. Martinez testified that:

[T]he average consumer in Puerto Rico during the 1950's, during the 1960's, was very well made aware of the hazards associated with smoking, particular diseases such as cancer and cardiovascular diseases. Individuals were also informed as a society that information was made available that smoking could substantially reduce someone's lifetime and also that smoking was or could be difficult to quit.

(Tr. 361). Dr. Martinez stated that the monolingual population in Puerto Rico was also well aware of the risks of smoking in the 1950's and 1960's. Id. In reaching Spanish-speaking risks of smoking his conclusion, Dr. Martinez considered evidence such as newspapers, historical publications, polls, surveys, school curriculum, textbooks, films, **16*** and reports by organizations such as the American Cancer Society and the Puerto Rico Lung Association. (Tr. 322).

FN5 If anything, the evidence that Plaintiff presented may actually support an inference that the public was aware of the risks of smoking. Plaintiff's grandmother testified that she has known for many years that smoking cigarettes is bad for a person's health. (Tr. 19). plaintiff's aunt attested that she learned from warnings that smoking is unhealthy. (Tr. 49) . However, neither of these witnesses specifically testified as to their knowledge in the 1960s.

Although Dr. Martinez is a defense witness, we will consider his testimony in passing on the present Rule 50 motion as if he is a disinterested witness, and his testimony has not been contradicted or impeached. Alvarez-Fonseca v. Pepsi Cola of P.R. Bottlins Co., F.3d 17, 23 (ISt Cir. 1998).

"Generally, a jury may not reject testimony that uncontradicted and unimpeached (directly, circumstantially, inferentially) unless credibility is at issue." Quintana-Ruiz, F.3d at 75. Although credibility determinations are typically reserved for the jury, "testimony concerning a simple fact, capable of contradiction, not incredible, and standing uncontradicted,

unimpeached, or in no way discredited by cross-examination, must be permitted to stand.'" Quintana-Ruiz, 303 F.3d at 75 (quoting Chicago, Rock Island & Pac. Ry. Co. v. Howell, 401 F.2d 752, 754 (10th Cir. 1968)).

Dr. Martinez was retained by Defendant witness and was paid approximately $40,000 Reynolds as an expert for his research and testimony. However, he had no financial or personal interest in the outcome of the case. Martinez's status as an expert retained by **17*** Defendant Reynolds is insufficient to make him an interested witness. See Quintana-Ruiz, 303 F.3d at 76; see also Chesapeake & 0. Ry. v. Martin, 283 U.S. 209, 216 (1931) (explaining that a witness is not necessarily incredible because he works for the defendant). Here, there is no claim of fraud or bias, and we consider Martinez to be a disinterested witness.

Plaintiff did not proffer any affirmative evidence to contradict or impeach Dr. Martinez' testimony. **FN6** Plaintiff had the opportunity at trial to adduce evidence indicating that the dangers of smoking were not common knowledge in the 1960s, but he did not to do so. During cross-examination, Dr. Martinez did not alter or recant his testimony that the dangers of smoking were common knowledge in Puerto Rico in the 1950's and 1960's.

FN6 Plaintiff claims that he proffered the Labeling Act as evidence that the public was not aware of the risks of smoking in the 19605. However, the Labeling Act was not evidence in this case. Furthermore, the mere fact that Congress passed the Labeling Act does not impute a lack of knowledge about the risks of smoking to the average consumer.

Furthermore, Dr. Martinez testified about matters that are not necessarily within the province of the lay juror. He testified about the common knowledge of the average consumer in Puerto Rico in the 1950s and 1960s. He was speaking of a historical period, and his testimony covered matters that were confirmed by historical hard **18*** evidence. The jury could not arbitrarily disregard his uncontradicted, unimpeached testimony. Cf. Quintana-Ruiz, 303 F.3d at 76 (explaining that a jury cannot reject the other side's uncontradicted expert testimony on technical matters outside of lay competence).

Since Plaintiff failed to impugn Dr. Martinez's testimony, the jury was not entitled to reject it, unless his credibility was at issue. Quintana-Ruiz, 303 F.3d at 75-6. A jury may reject testimony if there is affirmative evidence that a witnesses' credibility is at issue or if his testimony is "improbable, inherently contradictory, riddled with omissions, or delivered in a manner giving rise to doubts." Id. at 76.

Plaintiff did not proffer any affirmative evidence that Martinez was not a credible witness. Furthermore, Dr. Martinez' testimony was not improbable, inconsistent or otherwise facially unbelievable.

Plaintiff did not adduce any evidence about the knowledge of the ordinary consumer in the 1960's. Defendant Reynolds proffered a disinterested, uncontradicted, and unimpeached expert witness, who testified that the average Spanish speaking consumer in Puerto Rico was well aware of the health risks and addictive nature of smoking in the 1950s and 1960s. Based on Martinez' uncontradicted testimony and **19*** the law governing this case, the jury was required to find that Defendant Reynolds did not have a duty to warn the decedent of the risks of smoking before July 1, 1969.

Since Defendant Reynolds had no duty under Puerto Rico law to warn of the risks of smoking during the relevant time period, it is entitled to judgment as a matter of law as to Plaintiff Eli Rogelio Figueroa Cruz' claims of negligence and strict liability.

V. Conclusion

In accordance with the foregoing, we **GRANT** Defendant's motion for judgment as a matter of law. We **DENY** Plaintiff's motion under Rule 49 (a).

IT IS SO ORDERED.

San Juan, Puerto Rico, this 9th day of October, 2002.

S/F
Jose Antonio Fuste
U. S. District Judge

United States District Court,
D. Puerto Rico.

Irene CRUZ VARGAS, individually and as next-of-friend and natural guardian of
Eli Rogelio Figueroa Cruz, and Luis Rogelio Figueroa Cruz,
Plaintiffs,
v.
R.J. REYNOLDS TOBACCO COMPANY; R.J.R. Nabisco, Inc.; Nabisco Group Holdings,
Defendants.

No. 00CV2334.

June 28, 2002.

OPINION AND ORDER

FUSTE, District Judge.

Plaintiffs, Irene Cruz Vargas ("Cruz"), Eli Rogelio Figueroa Cruz, and Luis Rogelio Figueroa Cruz bring the present diversity action against Defendants, R.J. Reynolds Tobacco Company ("Reynolds"), R.J.R. Nabisco, Inc. ("R.J.R.Nabisco"), and Nabisco Group Holdings ("Nabisco Holdings"). *Docket Document No. 25.* Plaintiffs seek compensatory damages, attorney fees, and other costs. *Id.*

Plaintiffs and Defendant Reynolds file cross-motions for summary judgment and respective opposition motions. *Docket Document Nos. 54, 64, 69, 77.*

***112 I.**
Factual and Procedural History

Unless otherwise indicated, we derive the following factual summary from the statements of uncontested facts submitted by the parties in their summary judgment and opposition motions. *Docket Document Nos. 54, 64, 69, 77.*

Plaintiff Cruz is a resident of Puerto Rico and is the widow of Luis Rogelio Figueroa Serrano ("decedent"), who died on October 18, 1999. Plaintiffs Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz are the sons of Plaintiff Cruz and the decedent, and both are residents of Puerto Rico. *Docket Document No. 25.*

Defendant Reynolds is a New Jersey corporation with its principal place of business in North Carolina. *Id.* Defendant Reynolds designs, manufactures, and sells cigarettes, including Winston cigarettes, in Puerto Rico. *Id.* Defendant R.J.R. Nabisco is a Delaware corporation with its principal place of business in New York. Defendant R.J.R. Nabisco is the parent company of Defendant Reynolds. *Id.* Defendant Nabisco Holdings is corporation incorporated under the law of Delaware with its principal place of business outside of Puerto Rico. *Id.*

The decedent was born on August 28, 1951, and lived in Utuado, Puerto Rico his entire life. He worked as a mechanic, tow truck driver, and a public taxi driver. His primary language was Spanish. The decedent did not read newspapers or magazines and did not watch television. He could not read, write, or speak English.

The decedent attended the Juan Ponce de Leon school from 1968 to 1971. He began smoking Winston cigarettes during high school. Plaintiffs contend that the decedent began smoking as early as 1968. *Docket Document No. 77.* Defendant Reynolds maintains that the decedent did not begin to smoke until 1970. *Docket Document No. 54.* By the time he was twenty-six years old, the decedent was smoking at least two packs of cigarettes a day. The decedent continued to smoke two or three packs of Winston cigarettes a day until he died on October 18, 1999.

Beginning in 1994 or 1995, the decedent was diagnosed with hypertension. The severity of his illness is disputed by the parties. *See Docket Document Nos. 54, 77.* The decedent's medical records indicate that he did not consistently: take his hypertension medicine, participate in diagnostic testing, follow dietary instructions, or attend medical appointments. *Docket Document*

No. 54. However, Plaintiff Cruz attests that she supervised the decedent's medication intake, dietary habits, and other medical instructions to ensure the decedent's compliance. *Docket Document No. 77.*

In 1993 or 1994, the decedent's physician told him that smoking was affecting his health. In 1995 or 1996, the decedent's doctors informed him that his high blood pressure was related to smoking and that smoking exacerbated the high blood pressure.

Plaintiff Cruz discussed the health risks of smoking with the decedent more than nineteen years before he died.

Plaintiffs admit that they believed that the decedent was addicted to smoking for at least a year before he died.

The decedent passed away suddenly on October 18, 1999. On the date of his death, the decedent was forty-eight years old. No autopsy was performed.

Defendant Reynolds contends that other factors, besides smoking, were substantial contributing factors in the decedent's illness and death. These factors include: obesity, noncompliance with medical treatment, uncontrolled hypertension, family history of hypertension, possible renal ***113** stenosis, and possible pheochromocytoma. *Docket Document No. 54.*

Plaintiffs maintain that the decedent's smoking caused and aggravated his hypertension, and that smoking was as much as thirty percent responsible for his death. *Docket Document No. 77.* They also argue that pheochromocytoma and renal stenosis did not cause the decedent's death. *Id.*

Plaintiffs filed the initial complaint on October 17, 2000, *Docket Document No. 1,* and submitted an amended complaint on August 20, 2001. *Docket Document No. 25.* Plaintiffs' complaint alleges state law negligence and strict liability claims pursuant to 31 L.P.R.A. § 5141 (1991 & Supp. I 1998). *Id.* Specifically, Plaintiffs aver that Defendant Reynolds' cigarettes are defectively designed,

because they cause addiction, hypertension, and death. *Id.* Plaintiffs also assert that the health warnings on Defendant Reynolds' cigarette packages are inadequate, and that Defendant Reynolds had a duty to print Spanish health warnings on cigarette packages sold in Puerto Rico. *Id.*

Defendant Reynolds filed a motion for summary judgment on May 1, 2002, asserting that: (1) Plaintiffs' failure to warn claims are preempted by the Federal Cigarette Labeling and Advertising Act ("the Labeling Act"), 15 U.S.C § § 1331-1341 (1994 & Supp. I 2001); (2) Plaintiffs' negligence and strict liability claims are preempted pursuant to the doctrine of conflict preemption; (3) Defendant Reynolds' cigarettes were not a proximate cause of the decedent's illness or death; (4) Defendant Reynolds' cigarettes are not defective under Puerto Rico law; and (5) Plaintiffs Cruz and Luis Rogelio Figueroa Cruz's claims are time-barred. *Docket Document No. 54.* Plaintiffs filed an opposition to Defendant's motion on June 7, 2002. *Docket Document No. 77.*

On May 7, 2002, Plaintiffs filed a motion for partial summary judgment on the ground that Defendant Reynolds had an obligation to include Spanish warnings on cigarette packages sold in Puerto Rico. *Docket Document No. 64.* Defendant Reynolds tendered an opposition on May 21, 2002.

II.
Motion for Summary Judgment Standard under Rule 56(c)

The standard for summary judgment is straightforward and well-established. A district court should grant a motion for summary judgment "if the pleadings, depositions, and answers to the interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Lipsett v. Univ. of P.R.*, 864 F.2d 881, 894 (1st Cir.1988). A factual dispute is "material" if it "might affect the outcome of the suit under the governing law," and "genuine" if the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The burden of establishing the nonexistence of a genuine issue as to a material fact is on the moving party. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This burden has two components: (1) an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and (2) an ultimate burden of persuasion, which always remains on the moving party. *See* id. In other words, "[t]he party moving for summary judgment ... bears the initial burden of demonstrating that there are no genuine issues of material fact for trial." ***114***Hinchey v. NYNEX Corp.*, 144 F.3d 134, 140 (1st Cir.1998). This burden "may be discharged by showing that there is an absence of evidence to support the nonmoving party's case." Celotex, 477 U.S. at 325, 106 S.Ct. 2548. After such a showing, the "burden shifts to the nonmoving party, with respect to each issue on which he has the burden of proof, to demonstrate that a trier of fact reasonably could find in his favor." *DeNovellis v. Shalala*, 124 F.3d 298, 306 (1st Cir.1997) (citing Celotex, 477 U.S. at 322-25, 106 S.Ct. 2548).

Although the ultimate burden of persuasion remains on the moving party and the court should draw all reasonable inferences in favor of the nonmoving party, the nonmoving party will not defeat a properly supported motion for summary judgment by merely underscoring the "existence of some alleged factual dispute between the parties"; the requirement is that there be a genuine issue of material fact. *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505; *Goldman v. First Nat'l Bank of Boston*, 985 F.2d 1113, 1116 (1st Cir.1993). In addition, "factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Under Rule 56(e) of the Federal Rules of Civil Procedure, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e); *see also* Anderson, 477 U.S. at 256, 106 S.Ct. 2505. Summary judgment exists to "pierce the boilerplate of the pleadings," *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794 (1st Cir.1992), and "determine whether a trial actually is

necessary." *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 178 (1st Cir.1997).

III.
Analysis

A. *Statute of Limitations*

Defendant Reynolds contends that Plaintiffs Cruz and Luis Rogelio Figueroa Cruz' claims are time-barred because the statute of limitations began to run when they first learned that the decedent's health conditions were related to smoking. *Docket Document No. 54.* Defendant Reynolds acknowledges that Plaintiff Eli Rogelio Figueroa Cruz' claims are not time-barred because he is a minor and the statute of limitations is tolled until he reaches the age of majority. *See* 32 L.P.R.A. § 254 (1990). [FN1]

> FN1. The statute stipulates: "If a person entitled to bring an action, other than the recovery of real property, be at the time the cause of action accrued, ... within the age of majority ... the time of such disability is not a part of the time limited for the commencement of the action." 32 L.P.R.A. § 254(1) (1990).

Plaintiffs maintain that the statute of limitations did not begin to run until the decedent died on October 18, 1999, and that since they filed the present action within one year of the decedent's death, their action is timely.

The statute of limitations governing an action filed under 31 L.P.R.A. § 5141 is one year "from the time the aggrieved person had knowledge" of the injury. 31 L.P.R.A. § 5298(2) (1991 & Supp. I 1998). Pursuant to this rule, "the period of a cause of action begins to run as of the moment the aggrieved party learned or had knowledge of the damage and could institute the action." *Sánchez v. Autoridqd de Energia Electrica*, 142 D.P.R. 880, 1997 P.R.Eng. 878520 (1997). Knowledge requires both "notice of the injury" and "notice of the person who caused it." *Colon Prieto v. Geigel*, 115 D.P.R. 232, 247 (1984).

***115** Puerto Rico case law recognizes different types of damages, which are used to identify when a plaintiff had knowledge of an injury, and thus when the statute of limitations begins to run. *Sánchez*, 1997 P.R.Eng. 878520. Here, the relevant type of damages are continuing damages, which are defined as:

> those caused by one or more culpable or negligent acts imputable to the actor, coetaneous or otherwise, that result in uninterrupted, sustained, lasting, interlinked harmful consequences, which, when known, also reveal--as foreseeable--the continuous, uninterrupted character of its effects, turning at that moment into a real damage, composed of elements of actual damage (that which has already occurred) and of future damage that is foreseeable and, therefore, real.

Galib Frangie v. El Vocero de P.R., 138 D.P.R. 560, 575 (1995) (internal citation omitted). Continuing damages cases involve tortious acts that have uninterrupted and interlinked consequences, which are "known at a given moment, and at the moment they are known it can be foreseen that said consequences will steadily and incessantly continue in the future." *Sánchez*, 1997 P.R.Eng. 878520; *see also Santiago Rivera v. Ríos Alonso*, 156 D.P.R., ----, 2002 TSPR 15 (2002); 2 H.M. DEL TORO, LOS DANOS Y PERJUICIOS EXTRACONTRACTUALES EN PUERTO RICO 641-49 (2d ed.1986) (offering examples of continuing damages, such as damage to a building that a plaintiff knows will continue to deteriorate or a the rerouting of a river that a plaintiff knows will continue to cause erosion).

In continuing damages cases, as in other tort actions in Puerto Rico, the statute of limitations commences when the plaintiff has knowledge of the injury and the author of the damage. *See Sánchez*, 1997 P.R.Eng. 878520.

Notice of the injury occurs when there is:

> some outward or physical signs through which the aggrieved party may become aware and realize that he [or she] has suffered an injurious aftereffect, which when known becomes a damage even if at the time its full scope and extent cannot be weighed. These circumstances need not be known in order to argue that the

damage has become known, because its scope, extent and weight may be established later on during the prosecution of the remedial action.

Delgado Rodriguez v. Nazario De Ferrer, 121 D.P.R. 342, 21 P.R.Offic.Trans. 342, 356, 1988 WL 580813 (1988) (internal citations omitted).

"Once a plaintiff is on 'notice of the injury,' the plaintiff may 'not wait for his [or her] injury to reach its final degree of development and postpone the running of the period of limitation according to his [or her] subjective appraisal and judgment.' " *See* *Rodriguez-Suris v. Montesinos*, 123 F.3d 10, 13 (1st Cir.1997) (citing *Ortiz v. Municipio De Orocovis*, 113 D.P.R. 484, 487, 13 P.R.Offic.Trans. 619, 622, 1982 WL 210544 (1982)).

"Knowledge of the author occurs when plaintiff knew or with the degree of diligence required by law should have known whom to sue." *Rosado Serrano v. E.I. Dupont de Nemours & Co.*, 797 F.Supp. 98, 102 (D.P.R.1992).

[1] Here, Plaintiffs acknowledge that they knew the decedent was addicted to cigarettes more than a year before he died. *See Docket Document No. 77 (Resp. to Req. for Admissions).*

Plaintiff Cruz testifies that she knew of the health risks of smoking and told the decedent of these risks as early as 1980. *Id.* (Cruz Dep.). She attests that about ***116** three or four years before he died, the decedent's doctors informed him that his high blood pressure was related to smoking. Around the same time, a physician told the decedent that if he continued to smoke he could die or be "left like a vegetable" because smoking exacerbated his already high blood pressure. *Id.* Plaintiff Cruz also testifies that a doctor told the decedent that if he did not take his medications and he continued to smoke, he would die within five years. *Id.* Plaintiff Cruz testifies that she heard these statements while accompanying the decedent to his doctor's appointments. *Id.*

We find that Plaintiff Cruz had knowledge of the decedent's injuries and the relationship between these injuries and smoking at

least three or four years before the decedent's death. Furthermore, Plaintiff Cruz was told that the consequences of the decedent's smoking would continue in the future and lead to his death. We find that Plaintiff Cruz had knowledge of her actual injuries and foreseeable damages over a year before she filed suit. Therefore, Plaintiff Cruz's claims are time-barred. [FN2]

FN2. Future references to Plaintiffs allude to Plaintiffs Eli Rogelio Figueroa Cruz and Luis Rogelio Figueroa Cruz.

[2] Plaintiff Luis Rogelio Figueroa Cruz testified that he first believed that his father's health problems were related to smoking when the decedent was hospitalized for high blood pressure in 1994. *Id.* (Luis Rogelio Figueroa Cruz Dep.).

Plaintiff Luis Rogelio Figueroa Cruz had knowledge of his father's smoking related conditions as early as 1994. However, there is no evidence in the record that Plaintiff Luis Rogelio Figueroa Cruz knew that his father's smoking related illness would continue or would lead to his father's death. Therefore, we find that Plaintiff Luis Rogelio Figueroa Cruz's claims stemming from the death of his father are not time-barred.

B. Preemption of Failure-to-Warn Claims

1. *Post-1969 Claims*

Defendant Reynolds moves for summary judgment as to Plaintiffs' state law failure-to-warn claims on the ground that they are preempted by the Labeling Act, 15 U.S.C. § § 1331-1341. *Docket Document No. 54.* Defendant Reynolds maintains that since July 1, 1969, the effective date of the Labeling Act, they have had no duty to provide more information to the public about smoking and its health risks than that information which is required by the Labeling Act. *Id.*

Plaintiffs claim that the Labeling Act only preempts state claims

brought regarding the wording of cigarette labels, not those regarding foreign language warnings. *Docket Document Nos. 64, 77.* Plaintiffs contend that Defendant has violated the Labeling Act by not including health warnings on its cigarette packages in Spanish. *Id.* Plaintiffs argue that Defendant's failure to include warnings in Spanish is a violation of Puerto Rico law, and that such a claim is not preempted by the Labeling Act. *Id.*

We do not consider whether Plaintiffs' post-1969 failure to warn claim is cognizable under state law. Rather, we evaluate whether Plaintiffs' claim that Defendant Reynolds had a duty to provide cigarette warnings in Spanish is preempted by the Labeling Act.

The Labeling Act provides a list of warnings which must be printed on packages of cigarettes that are manufactured, packaged, sold, imported, or distributed ***117** within the United States. *See* 15 U.S.C. § 1333(a)(1). [FN3] The mandatory warnings, as found in the statute, are in English. *See id.* The Labeling Act's requirements apply in Puerto Rico. *See* 15 U.S.C. § 1332(3).

FN3. The statute provides:

It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

15 U.S.C. § 1333(a)(1).

The statute provides that, "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334(a). "In [this] pre- emption provision, Congress unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542, 121 S.Ct. 2404, 150 L.Ed.2d 532 (2001); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n. 9, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) ("The territory exclusively occupied by federal law was defined in the text of the statute itself; that text specified the precise warning to smokers that Congress deemed both necessary and sufficient.")

[3][4] The requirements of the Labeling Act are unambiguous. The statute provides the precise and mandatory language for cigarette package warnings. The statute does not require the warnings to be in any other languages besides English, and Plaintiffs have not cited any relevant authority to support their contention. Furthermore, the Labeling Act provides that no additional warnings are required on cigarette packages, and we find that this includes warnings in Spanish. By its terms, section 1334(a) preempts Plaintiffs' state-law failure-to-warn claims as of the effective date of the Labeling Act.

2. *Pre-1969 Claims*

State-law damages claims based on inadequate warnings prior to July 1, 1969 are not preempted. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519-20, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992).

[5] Defendant Reynolds proffers evidence that the decedent began to smoke in 1970. *Docket Document No. 54* (Resp. to Req. for Admissions). Plaintiffs submit testimony that the decedent began to smoke as early as 1968. *Docket Document No. 77, Exhs. 1, 3, 4.* As such, there exists a genuine issue of material fact as to whether the decedent smoked prior to the effective date of the Labeling Act, and whether Plaintiffs have a claim for failure to

warn of the hazards of smoking prior to the effective date of the Labeling Act.

C. *Conflict Preemption*

Defendant Reynolds moves for summary judgment as to Plaintiffs' claims which assert liability based on the inherent characteristics of tobacco and cigarettes. Defendant Reynolds asserts that any such claims are barred by the doctrine of conflict preemption. *Docket Document No. 54.* According to Defendant, the doctrine of conflict preemption prevents state laws from being applied in a manner that conflicts ***118** with or frustrates the purpose of federal statutes. *Id.*

Conflict preemption occurs where "a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995) (internal citations omitted); *see also Insolia v. Philip Morris Inc.*, 128 F.Supp.2d 1220, 1224 (W.D.Wis.2000) ("If Congress gives express sanction to an activity, the states cannot declare that activity tortious.") (internal citation omitted).

[6] Congress has foreclosed the removal of tobacco products from the market. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000); *see also* 7 U.S.C. § 1311(a) (1994 & Supp. I 2001) ("The marketing of tobacco constitutes one of the greatest basic industries of the United States...."); 15 U.S.C § 1331 (declaring congressional policy to protect the national economy while informing smokers about the adverse effects of cigarettes).

Therefore, the court in *Insolia* reasoned that "allowing tort actions against cigarette manufacturers and sellers for the allegedly negligent act of continuing to make and sell cigarettes would interfere with Congress's policy in favor of keeping cigarettes on the market." 128 F.Supp.2d at 1224-25; *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 886, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000) (finding tort action preempted where the rule of state

tort law that the plaintiff argued for would stand as an obstacle to Congress' objective).

We find that Plaintiffs are barred from pursuing a state-law tort claim based exclusively on the theory that Defendant Reynolds manufactured and sold cigarettes. Defendant Reynolds cannot be held liable under Puerto Rico law simply because it manufactures and sells cigarettes. Therefore, to the extent that Plaintiffs seek to impose tort liability against Defendant Reynolds merely for manufacturing and selling cigarettes, we find Plaintiffs' claims to be preempted.

D. *Proximate Causation*

[7] Defendant Reynolds requests summary judgment as to all of Plaintiffs' negligence and strict liability claims on the ground that they have failed to show that the decedent's smoking caused his illness and death. *Docket Document No. 54.*

To establish negligence and strict liability, Plaintiffs must proffer evidence which supports a conclusion that smoking was a substantial factor in the decedent's injuries. *See* Muñiz-Nuñez v. *Am. Home Prods. Corp.*, 582 F.Supp. 459, 461 (D.P.R.1984) (internal citation omitted); *see also* Carballo-Rodriguez v. Clark Equip. Co., 147 F.Supp.2d 66, 71-72 (D.P.R.2001).

[8] Plaintiffs' expert witness, Dr. James Nelson, testified that smoking was a substantial factor in the decedent's death. *See Docket Document No. 77, Exh. 6.* Dr. Nelson's testimony creates a genuine issue of material fact as to causation. [FN4]

FN4. We find that Dr. Nelson's testimony is admissible under Federal Rule of Evidence 702. *See* Fed.R.Evid. 702; *see also Mitchell v. United States*, 141 F.3d 8, 15 (1st Cir.1998) (explaining that district court has substantial discretion to decide whether to admit relevant expert testimony). Although Defendant Reynolds appears to disagree with Dr. Nelson's reasoning and conclusion, that is

not a sufficient basis to exclude the testimony. " 'The question whether the basis of the doctor's opinion is sound goes to the weight of the evidence, not its admissibility.' " *See* Mitchell, 141 F.3d at 15 (internal citation omitted).

119 E. *Defective Design

Defendant Reynolds contends that Plaintiffs have not established that Winston cigarettes are defective, and as such cannot establish negligence or strict liability for defective design. *Docket Document No. 54.*

1. *Negligence*

As we explained *supra,* Plaintiffs' post-1969 failure-to-warn claims are preempted by the Labeling Act.

Plaintiffs do not respond to the allegations that their negligence claims are flawed or provide evidence to support a finding of negligence. *Id.* It appears from Plaintiff's summary judgment motion that they are no longer asserting that Defendant Reynolds acted negligently in designing Winston cigarettes.

To establish a claim of negligence, Plaintiffs must establish that "(1) defendant owed a duty to prevent the harm by conforming to a reasonable standard of conduct, (2) defendant breached that duty through a negligent act or omission, and (3) the negligent act or omission caused the plaintiff's harm." Carballo-Rodriguez, 147 F.Supp.2d at 72 (citing Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d 1169, 1171 (1st Cir.1992)). Plaintiffs bear the burden of establishing the applicable standard of care, and proving that Defendants acted below that standard.

[9] Here Plaintiffs have not proffered any evidence regarding the applicable standard of care for designing cigarettes or how Defendant Reynolds purportedly fell below such a standard. Therefore, to the extent that Plaintiffs are arguing that Defendant Reynolds negligently designed its cigarettes, we find that Plaintiffs

have not created a genuine issue of material fact as to these claims, and Defendant Reynolds is entitled to summary judgment.

2. *Strict Liability*

Plaintiffs assert that Defendant Reynolds is strictly liable for failing to warn the decedent of the risks and addictive nature of smoking and defectively designing its cigarettes. *Docket Document No. 77.*

To establish strict liability for a design defect under Puerto Rico law, Plaintiffs must show that Defendant Reynolds "places a product on the market, knowing that it is to be used without inspection for defects, and it has a defect that *causes* injuries." *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 971 (1st Cir.1991) (internal citations omitted). Puerto Rico has generally adopted the principles of strict liability set out in the Restatement (Second) of Torts § 402A. [FN5] *Id.* However, under Puerto Rico law, the defect in the product does not have to be "unreasonably dangerous to the user or consumer." *Montero Saldana v. Am. Motors Corp.*, 107 D.P.R. 452, 7 P.R.Offic.Trans. 501, 508, 1978 WL 48845 (1978). Rather, Plaintiffs only need to establish that the product is unsafe. *Id.*

> FN5. The Restatement provides that:
> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> Restatement (Second) of Torts § 402A(1) (1963 & Supp. I 2002).

The parties agree that California's consumer expectations test governs Plaintiffs' design defect claims. *See Docket Document*

Nos. 54, 77. Under this test, "a product may be found defective in design if the plaintiff demonstrates 'that the product failed to perform as safely as an ordinary ***120** consumer would expect when used in an intended or reasonably foreseeable manner.' " *Carballo-Rodrigurez*, 147 F.Supp.2d at 72 (internal citation omitted) (explaining that Puerto Rico has adopted the California Supreme Court's formula for establishing strict liability). A plaintiff can demonstrate the defectiveness of a product through circumstantial evidence, and need not resort to expert testimony. *See Barker v. Lull Eng'g*, 20 Cal.3d 413, 430, 143 Cal.Rptr. 225, 573 P.2d 443 (1978).

As evidence of a design defect, Plaintiffs offer the testimony of the decedent's wife, who explains that he was told that if he continued to smoke he could die or be left in a vegetative state. *Docket Document No. 77.* Plaintiffs also proffer an admission from Defendant Reynolds that nicotine is addictive and an admission that over the years, Defendant Reynolds has significantly reduced the amount of tar and nicotine found in its cigarettes. *Id.* Defendant Reynolds also admits that it has the ability to alter the amount of a number of naturally occurring cigarette constituents, including nicotine. *Id.* Plaintiffs submit a 1988 report from the Surgeon General of the United States, which states that cigarettes are addicting and that nicotine is the drug that causes addiction. *Id.* Finally, Plaintiffs offer the testimony of Defendant Reynolds' expert witness, who testifies that it has been widespread, common knowledge for more than fifty years that cigarette smoking can cause serious, life-shortening diseases and can be very addictive. *Id.*

[10] Plaintiffs' proffered evidence does not support the position that the ordinary consumer does not know or did not know in the past that cigarettes were addictive and dangerous for smokers. In fact, Plaintiffs have not proffered any evidence suggesting what the ordinary consumer expected from cigarettes. Furthermore, Plaintiffs do not argue that Winston cigarettes in particular fell below the ordinary consumer's expectations. Without any evidence regarding consumers' expectations, Plaintiffs' design defect claims arising under this test necessarily fail. *See Collazo-Santiago v.*

Toyota Motor Corp., 937 F.Supp. 134, 139 (D.P.R.1996) (explaining that in order to establish a design defect under the consumer expectation test, a plaintiff must " 'produce evidence that the product failed to satisfy ordinary consumer expectations as to safety' "); *see also* *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir.1990) ("[s]ummary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.").

IV.
Conclusion

Since Plaintiff Cruz had knowledge of the decedent's injuries, the author of those injuries, and knowledge that such injuries would continue at least a few years before she filed her complaint, we find that her claims against Defendant Reynolds are time-barred. Therefore, we **GRANT** Defendant Reynolds' motion for summary judgment as to Plaintiff Cruz' claims. However, the record does not support a finding that Plaintiff Luis Rogelio Figueroa Cruz' claims are time- barred, and we **DENY** Defendant Reynolds' motion for summary judgment on timeliness grounds as to this Plaintiff.

This court finds that Plaintiffs' failure-to-warn claims are preempted by federal law as of the effective date of the Labeling Act, July 1, 1969. The statute does not require cigarette manufacturers to provide warnings in any language other than English. Therefore, we **DENY** Plaintiffs' motion for summary judgment on the ground that Defendant Reynolds was obligated to provide warnings in Spanish after July 1, ***121** 1969. We **GRANT** Defendant Reynolds' motion for summary judgment as to Plaintiffs's post-1969 failure-to-warn claims.

There exists a genuine issue of material fact as to when the decedent began to smoke, and whether Plaintiffs have stated failure-to-warn claims that predate the Labeling Act. We **DENY** Defendant Reynolds' motion for summary judgment as to Plaintiffs' failure-to-warn claims that arose prior to July 1, 1969.

This court finds that to the extent Plaintiffs are asserting liability based solely on Defendant Reynolds' manufacture and sale of cigarettes, their claims are preempted, and we **GRANT** Defendant's motion for summary judgment of those claims.

Plaintiffs have created a genuine issue of material fact as to causation, and we **DENY** Defendant Reynolds' request for summary judgment on this ground.

Plaintiffs have not proffered evidence which supports their defective design claims and we **GRANT** Defendant Reynolds' motion for summary judgment as to these claims.

IT IS SO ORDERED.

218 F.Supp.2d 109